child directly into the home of a preferred placement allows for an unbroken connection to the Tribe and family.

Response: The Act does not explicitly require that emergency placements comply with the placement preferences, so the rule does not include this suggestion. As a recommended practice, however, States should make emergency placements of Indian children in accordance with the placement preferences whenever possible and as soon as possible. This will help prevent subsequent disruptions if the child needs to be moved to a preferred placement once a child-custody proceeding is initiated.

3. 30-Day Limit on Temporary Custody

Comment: Several commenters supported the provision at FR § 23.113(f) prohibiting continuation of emergency removal or placement beyond 30 days without the initiation of a full ICWA-compliant child-custody proceeding, to clarify that emergency proceedings must terminate as soon as they are no longer necessary to prevent imminent physical damage or harm to the child. The National Council of Juvenile and Family Court Judges stated that this provision, and shortening the time period for temporary custody without a hearing from 90 to 30 days, align with key principles of avoiding unnecessary separation of children and families and are best practices.

A few commenters opposed making the 30-day provision a mandate. One commenter stated that agencies may avoid emergency removals or remove children earlier than appropriate to avoid the detailed steps to necessary satisfy this section, resulting in Indian children being less protected from harm.

A few commenters stated that a shorter time should be included in the rule. One commenter noted that, often, returning a child to a parent within 72 hours will not result in

imminent physical damage or harm. Another commenter suggested that State law should govern the timing of the initial evidentiary hearing, provided it is no longer than 72 hours after removal (and then that the removal may not last beyond 30 days without a § 1912(e)-compliant foster care hearing). Commenters noted that allowing for longer periods of removal will make return to parental custody increasingly more difficult due to a combination of agency practice and consequential trauma to the parents from separation. One commenter also suggested adding a 45-day presumptive deadline by which an adjudicatory hearing must be held, to ensure the parent receives a hearing within a meaningful time.

Response: The basis for the presumptive 30-day outer limit for an emergency proceeding is discussed above. The rule's emergency proceedings provisions are designed to ensure that such removals/placements be as short as possible and that the Indian children be returned home (or transferred to their Tribe's jurisdiction) as soon as the threat of imminent physical damage or harm has ended, or that State officials "expeditiously" initiate a child-custody proceeding subject to all ICWA protections.

The concerns that the 30-day limit is too short are addressed through adjusting the rule's language regarding the circumstances under which the time period may be extended, as discussed above. *See* FR § 23.113(d). Notably, in light of the comments received, these changes include deleting the requirement for obtaining a qualified expert witness by that time.

The rule does not specify that a hearing should be held within 72 hours of removal. While providing a hearing within 1-3 days of removal may be required to comply with State law or to provide the parents or custodian with constitutionally required due process, the provision of such a hearing is not an ICWA-specific requirement, so it is not required by the rule.

Comment: Two commenters stated there are difficulties in obtaining qualified expert witness testimony in a timely fashion and that the timeframe would be increasingly difficult if the Tribe were out of State, the Tribe were unable or unwilling to provide an expert, or the exact Tribe is unknown. Another commenter noted that Tribes have up to 30 days to respond to notice, making it nearly impossible to secure expert witness testimony in that time. A commenter also stated that New Mexico allows for adjudication of an abuse/neglect petition to occur within 60 days but the proposed rule's requirements for clear and convincing evidence at an earlier stage (emergency stage) would cause more than one full evidentiary hearing on whether the parent's custody is likely to result in imminent physical damage or harm.

Response: The final rule deletes from the emergency proceeding requirements certain requirements that apply to child-custody proceedings (e.g., requirement for a qualified expert witness and clear and convincing evidence) because § 1922 of ICWA does not impose such requirements on emergency proceedings and, as the commenters noted, compliance with these requirements may not be practically possible.

4. Emergency Proceedings – Timing of Notice and Requirements for Evidence

Comment: Several commenters opposed the proposed rule's requirements for notice and time limits to apply to emergency hearings (known in various States as 72-hour hearings, detention hearings, shelter care hearings, and other terms). These commenters stated that it is not possible to comply with the time limits (e.g., waiting until 10 days after each parent, the Indian custodian, and Tribe have received notice before beginning the proceeding) and comply with State law requiring a hearing shortly following emergency removal. A State commenter stated that once a child is removed on an emergency basis, a petition must be filed within 48 hours, and the petition is the commencement of the proceeding, then a hearing must be held the next judicial

day to determine if it is a dependency action, then a jurisdiction hearing is held within 21 days, at which time the petition is confirmed. The proposed rule's statement that a proceeding may not begin means the petition may not be filed (again, resulting in either a delayed return to parents or no initial removal to the detriment of the child). Commenters suggested adding to the end of PR § 23.111(h) and at the beginning of PR § 23.112 exceptions for emergency removals and emergency placements.

Response: The final rule does not require that the § 1912(a) notice provisions and waiting periods for notices apply to emergency proceedings. These requirements are not imposed by § 1922. The final rule does, however, indicate that agencies should report to the court on their efforts to contact the parents, custodian, and Tribe for emergency proceedings. FR § 23.113(c).

Comment: Several commenters stated that, where it is impossible to notify the Tribe and give adequate time to intervene or transfer, the decision should not be binding on the party that did not receive notice.

Response: To the extent the commenters are concerned that emergency placements may become permanent placements, the final rule confirms that emergency proceedings must terminate as soon as the emergency ends and, at that point, either the child must be returned to the parent, custodian, or Tribe or the State must initiate a child-custody proceeding following ICWA's requirements, including notice requirements. *See* FR §§ 23.110, 23.113.

Comment: A State commenter stated that it is unclear what is meant by "substantive proceedings, rulings or decisions on the merits" and how it relates to emergency removals (shelter care hearings). Another State commenter requested clarification that "on the merits" means this section does not apply to emergency removals.

Response: The final rule deletes the phrase "substantive proceedings, rulings, or decisions on the merits" from what was PR § 23.111(h) and clarifies that the § 1912(a) notice provisions and waiting periods for notices do not apply to emergency proceedings.

5. Mandatory Dismissal of Emergency Proceedings

Comment: A few commenters stated that PR § 23.110 and PR § 23.113 conflict in that PR § 23.110 says that a State court must dismiss the proceeding if it determines it lacks jurisdiction, and PR § 23.113 says States must transfer the proceeding. A commenter stated that the wording of PR § 23.110(a) creates a safety issue because it implies that transferring to Tribal court is not an option and would result in cases being dismissed where children were at imminent risk of harm.

Response: The mandatory dismissal provisions in § 23.110 apply "subject to" § 23.113 (emergency proceedings). Section 1922 of the Act allows removal and placement under State law to prevent imminent physical damage or harm to the child. *See* FR § 23.110.

6. Emergency Proceedings Subsection-by-Subsection

Comment: With regard to PR § 23.113(a)(1), a commenter stated that because the terms "proper" and "continues to be necessary" are subjective and open to culturally biased interpretation, the investigation should include input from a qualified expert witness, Tribal representatives, and members of the child's extended family not connected with the emergency who have a relationship with the child.

Response: The final rule uses the term "necessary" because that is the term the statute uses. *See* 25 U.S.C. 1922. *See* FR § 23.113(b)(1).

Comment: With regard to PR § 23.113(a)(2), a few commenters suggested "promptly hold a hearing" needs a more definitive timeframe. One of these commenters suggested replacing "promptly hold a hearing" with "promptly, but in no case beyond 72 hours, hold a hearing."

Response: The final rule continues to use the term "promptly," recognizing that different States may have different timeframes for being able to hold such a hearing. *See* FR § 23.113(b)(2).

Comment: A commenter suggested clarifying in PR § 23.113(a)(2) and (a)(3) that if the agency determines the emergency has ended, it should promptly return the child without the need for a hearing. A hearing should be required only when a court order entered in connection with the emergency removal must be vacated or dismissed.

Response: State procedures determine whether a hearing is required.

Comment: A commenter asked whether the notice requirements in PR § 23.113(b)(5), to "take all practical steps to notify" are intended to be so radically different from the notice requirements for foster care, which requires 10 days advance notice. A few commenters suggested more definition of "practical steps" is needed. One of these commenters suggested adding notice via personal service, email, telephone, registered mail, and fax. A few commenters suggested that notice by registered mail should be required in addition to taking all practical steps to notify the parents or Indian custodian and Tribe.

Response: Notice by registered or certified mail is not required by ICWA for emergency proceedings because § 1922 does not require such notice and because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' rights in these situations, however, it is a recommended practice for the

agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact.

Comment: A commenter suggested specifying that notice of an emergency removal and emergency placement must fully inform the parents and the Tribe promptly of the timing of the emergency hearing and basis for the removal, including copies of the petition, affidavit and any evidence in support of the emergency removal, the parents and Indian custodian be advised of the full scope of their rights at the hearing, including the right to be present, to contest the allegations, to testify, and to call witnesses and introduce evidence, cross-examine adverse witnesses, and to have counsel appointed.

Response: These requirements are not specified by § 1922 and so are not included in the rule (although there may be relevant State and due process requirements). Any emergency proceeding pursuant to § 1922, however, is required to be as short as possible, after which the child is to be returned to the parent, custodian, or Tribe or a child-custody proceeding with all the attendant ICWA protections is to be initiated.

Comment: A few commenters pointed out that PR § 23.113(c) is missing.

Response: The final rule addresses this omission.

Comment: One commenter noted that the requirements in PR § 23.113(d)(7) and (d)(9) (requiring the affidavit to include the circumstances leading to the emergency removal and active efforts taken) and PR § 23.113(f) (requiring custody to continue beyond 30 days only if certain circumstances exist) mirror requirements of the Oklahoma ICWA and are the "gold standard" resulting in faster identification of Indian children, streamlined Tribal involvement, faster placements in preferred homes, and less time out of home.

A commenter stated concern that a failure to include any of the required elements in the affidavit may result in denial of the petition, even if the child is in imminent danger.

One commenter stated that the information required by PR § 23.113(d) to be included in the affidavit is already included in the State's dependency petitions, and requested adding that such information is required only if the petition does not already include the information.

Response: The final rule states that either the petition or accompanying documents (which may include an affidavit) should include a statement of the imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary to prevent such imminent physical damage or harm to the child (which was listed in proposed 23.113(d)(10)). *See* FR § 23.113(d). This information is appropriate under ICWA § 1922. The final rule separately lists additional information (which was listed in PR §§ 23.113(c)(1)-(10)), that should be included in the petition or accompanying documents. Inclusion of these items is a recommended practice and, as a commenter noted, the "gold standard" for ICWA implementation.

Comment: A commenter suggested incorporating some of the requirements of the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) § 209 regarding determination of a child's residence or domicile, where the child has been living for the past 5 years, and prior court proceedings.

Response: This rule addresses implementation of ICWA and does not address implementation of UCCJEA, so it does not include such requirements.

Comment: A commenter suggested adding a requirement in PR § 23.113(d)(3) that the petition include efforts to locate extended family members.

Response: The final rule does not add the requested requirement because it is not required by the statute; however, it is a recommended practice to make efforts to locate extended family members as soon as possible.

Comment: A commenter suggested amending PR § 23.113(d)(3) to require the petition to include a statement that if the domicile or residence of the parents or Indian custodian is unknown, that a detailed description of the efforts to identify them, including notice to the Tribal social services agency, submission of an affidavit of service by publication, and other avenues such as the Tribal enrollment office or posting on the Tribal bulletin board or newsletter, for parents who are hard to locate.

Response: The final rule states that the petition or accompanying documents should include a description of the steps taken to locate and contact the child's parents, custodians and Tribe about any emergency proceeding, but does not specify the detail suggested by the commenter.

Comment: A commenter expressed concern that requiring a factual determination on the need for continued removal at every hearing may result in fewer protections for parents because a full evidentiary hearing for the emergency hearings would give States cause to extend the deadline for the first hearing. For this reason, the commenter suggested deleting PR § 23.113(e).

Response: Because of the statutory requirement to "insure" that emergency proceedings terminate "immediately" when the emergency has ended, the State court (and agency) have a continuing obligation under § 1922 to evaluate whether the emergency situation has ended. The court therefore needs to revisit that issue at each opportunity. The Department does not agree that this will result in fewer protections for parents because an assessment of the need for continued

removal will occur at each hearing, meaning the parent has the opportunity for return of the child at each hearing.

Comment: A few commenters suggested rewording PR § 23.113(g) to provide that the placement must terminate as soon as the Tribal court issues an order for the placement to terminate, instead of when the Tribe exercises jurisdiction. The commenters stated that this would better allow the Tribe the opportunity to decide whether the placement should continue.

Response: A State court may terminate an emergency proceeding by transferring the child to the jurisdiction of the appropriate Indian Tribe. *See* 25 U.S.C. 1922; FR § 23.113(b)(4)(ii). The child may stay in a particular placement if the Tribe chooses to keep that placement upon exercising jurisdiction.

Comment: A commenter suggested the placement terminate as soon as the emergency no longer exists or a solid safety plan is in place, in which case dismissal may be appropriate at an early stage.

Response: A safety plan may be a solution to mitigate the situation that gave rise to the need for emergency removal and placement and allow the State to terminate the emergency proceeding. If the State court finds that the implementation of a safety plan means that emergency removal or placement is no longer necessary to prevent imminent physical damage or harm, the child should be returned to the parent or custodian. The State may still choose to initiate a child-custody proceeding, or may transfer the case to the jurisdiction of the Tribe.

Comment: A commenter stated that requiring termination of the emergency removal as soon as the imminent physical damage or harm no longer exists is unworkable in Montana because Montana requires parents to work on treatment plan tasks and make progress before the

State will return the children. The commenter stated that the proposed rule provision subverts that Montana process and allows for unlimited challenge to the State's out-of-home placement.

Response: Under the statute, the emergency removal and placement must end when no longer necessary to prevent imminent physical damage or harm to the child. If the court finds that the parent must make progress on specified case plan items in order to prevent imminent physical damage or harm to the child, that is permissible under ICWA. The State agency may also promptly initiate a child-custody proceeding with all the attendant ICWA protections.

Comment: A few State commenters stated that requiring an agency to expeditiously "initiate a child-custody proceeding subject to the provisions of ICWA" as one of the options following termination of emergency removal is confusing because the emergency removal petition is considered an initiation of a child-custody proceeding. Other commenters stated that the ICWA proceeding should be initiated at the same time as the emergency proceeding, because emergency proceedings are generally only subject to State law.

Response: The statute treats emergency proceedings, at § 1922, differently from other child-custody proceedings. The final rule clarifies "emergency proceedings" to be emergency removals and emergency placements, which are proceedings distinct from child-custody proceedings" under the statute. While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child. The emergency proceedings should be as short as possible and may end with the initiation of a child-custody proceeding subject to the provisions of ICWA (e.g., the notice required by § 23.111, time limits required by § 23.112).

Comment: One commenter stated that the provision at PR § 23.113(h) requiring a child to be returned to a parent within one business day may not be possible in parts of Alaska in which villages can be weathered out for days.

Response: The statute provides that emergency removal and placement must end when no longer necessary to prevent imminent physical damage and harm. We understand that it may not be possible to return a child within one business day.

7. Emergency Proceedings – Miscellaneous

Comment: A few commenters suggested replacing the term "emergency physical custody" with "emergency placement" for consistency.

Response: The final rule incorporates this suggestion.

I. Improper Removal

FR § 23.114 implements § 1920 of the statute. It requires that, where a court determines that a child has been improperly removed from custody of the parent or Indian custodian or has been improperly retained in the custody of a petitioner in a child-custody proceeding, the court should return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C. 1920.

Comment: A commenter stated that PR § 23.114(b) should refer to the standard in ICWA § 1920 ("substantial and immediate danger or threat of danger") specific to improper removals rather than the standard in 25 U.S.C. 1922 ("imminent physical damage or harm") specific to emergency removals. A commenter requested adding "Indian" before "custodian."

Response: The final rule incorporates these suggested changes to more closely reflect the statutory language. *See* FR § 23.114(b).

Comment: A few State commenters stated that the proposed rule's provisions on improper removal exceed ICWA and are beyond BIA's authority. One stated there is no standard for when a person can request a stay and demand an additional hearing to determine if removal was improper, and the other stated that requiring an immediate stay creates a substantive requirement that may unreasonably preclude the State protective services from securing an order of protection from the court.

Response: The final rule replaces the requirement for the State court to stay the proceedings with a requirement that the State court expeditiously make the determination as to whether the removal was improper. *See* FR § 23.114(a).

Comment: A commenter suggested rewording this section to require the court to terminate the proceeding and return the child if any party asserts improper removal or the court has reason to believe the removal was improper due to expert testimony not having been presented at the time of removal.

Response: The final rule does not incorporate this suggestion because the statute does not require expert testimony at the time of removal.

J. Transfer to Tribal Court

25 U.S.C. 1911(b) provides for the transfer of any State court proceeding for the foster-care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's Tribe. This provision recognizes that Indian Tribes maintain concurrent jurisdiction over child-welfare matters involving Tribal children, even off of the reservation. In enacting ICWA, Congress recognized that child-custody matters involving Tribal children are "essential tribal relation[s]," *see Williams v. Lee*, 358 U.S. 217 (1959), that fall squarely within a Tribe's right to govern itself. H.R. Rep. No. 95-1386, at 14-15. Congress

also recognized that State courts were often not well-informed about Indian culture, and may not correctly assess the standards of child abuse and neglect in this context. *Id.* at 11. Tribal-court jurisdiction remedies this problem.

Tribal courts are also well-equipped to handle child-welfare proceedings, including those involving non-member parents. Congress has repeatedly sought to strengthen Tribal courts, and has recognized that Tribal justice systems are an essential part of Tribal governments. 25 U.S.C. 3601(5), 3651(5); *see also* S. Rep. No. 103-88, at 8 (1993) (noting that 25 U.S.C. 3601(6) "emphasize[s] that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals"); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450, 450a (providing funding and assistance for Tribal government institutions, including courts); Indian Tribal Justice Act of 1993, 25 U.S.C. 3601 *et seq.* (establishing the Office of Tribal Justice Support within the Bureau of Indian Affairs and authorizing up to $50 million annually to assist Tribal courts).

The final rule reflects 25 U.S.C. 1911(b)'s requirement that a child-custody proceeding be transferred to Tribal court upon petition of either parent or the Indian custodian or the Indian child's Tribe, except in three circumstances: (1) where either parent objects; (2) where the Tribal court declines the transfer; or (3) where there is good cause to the contrary. The first two exceptions are fairly straightforward. The third exception is not defined in the statute, and in the Department's experience, has in the past been used to deny transfer for reasons that frustrate the purposes of ICWA. The legislative history indicates that this provision is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the Tribe are fully protected. *See* H.R. Rep. No. 95-1386, at 21. The Department finds that this indicates that

Congress intended for the transfer requirement and its exceptions to permit State courts to exercise case-by-case discretion regarding the "good cause" finding, but that this discretion should be limited and animated by the Federal policy to protect the rights of the Indian child, parents, and Tribe, which can often best be accomplished in Tribal court. Exceptions cannot be construed in a manner that would swallow the rule.

Accordingly, the final rule does not mandate or instruct State courts as to how they must conduct the good-cause analysis. Rather, the final rule provides certain procedural protections, and also identifies a limited number of considerations that should not be part of the good-cause analysis because there is evidence Congress did not wish them to be considered, or they have been shown to frustrate the application of 25 U.S.C. 1911(b) and the purposes of ICWA, or would otherwise work a fundamental unfairness. FR § 23.118. Specifically:

- The final rule prohibits a finding of good cause based on the advanced stage of the proceeding, if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage. This protects the rights of the parents and Tribe to seek transfer where ICWA's notice provisions were not complied with, and thus will help to promote compliance with these provisions. It also ensures that parties are not unfairly advantaged or disadvantaged by noncompliance with the statute.

- The final rule prohibits a finding of good cause based on whether there have been prior proceedings involving the child for which no petition to transfer was filed. ICWA clearly distinguishes between foster-care and termination-of-parental-rights proceedings, and these proceedings have significantly different implications for the Indian child's parents and Tribe. There may be compelling reasons to not seek transfer for a foster-care proceeding, but those reasons may not be present for a termination-of-parental-rights proceeding.

- The final rule prohibits a finding of good cause based on predictions of whether the transfer could result in a change in the placement of the child; this has been altered slightly from the proposed rule, which could be read to assume that a State court could know or predict which placement a Tribal court might consider or ultimately order. As an initial matter, these predictions are often incorrect. Like State courts, Tribal courts and agencies seek to protect the welfare of the Indian child, and would consider whether the current placement best meets that goal. Further, the transfer inquiry should not focus on predictions or speculation regarding how the other tribunal might rule regarding placement or any other matter. ICWA recognizes that Tribal courts are presumptively well-positioned to adjudicate child-custody matters involving Tribal children. Tribal courts will evaluate each case on an individualized basis to determine whether a change in placement is in the interests of the child, and if so, how to effect the change in placement with the minimum disruption to the child.

- The final rule prohibits a finding of good cause based on the Indian child's perceived cultural connections with the Tribe or reservation. Congress enacted ICWA in express recognition of the fact that State courts and agencies were generally ill-equipped to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. 25 U.S.C. 1901(5). It would be inconsistent with congressional intent to permit State courts to evaluate the sufficiency of an Indian child's cultural connections with a Tribe or reservation in evaluating a motion to transfer.

- The final rule prohibits consideration of any perceived inadequacy of judicial systems. This is consistent with ICWA's strong recognition of the competency of Tribal fora to address child-custody matters involving Tribal children. It is also consistent with § 1911(d)'s

requirement that States afford full faith and credit to public acts, records, and judicial proceedings of Tribes to the same extent as any other entity.

- The final rule prohibits consideration of the perceived socioeconomic conditions within a Tribe or reservation. In enacting ICWA, Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their families and Tribes. *E.g.,* H.R. Rep. at 12. Congress also found that States "have often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *See* 25 U.S.C. 1901(5). These factors can introduce bias into decision-making and should not come into play in considering whether transfer is appropriate.

State courts retain the ability to determine "good cause" based on the specific facts of a particular case, so long as they do not base their good cause finding on one or more of these prohibited considerations.

1. Petitions for Transfer of Proceeding

Comment: Several commenters stated that the proposed rule's provisions on transfer exceed statutory authority by allowing a transfer to Tribal court in any child-custody proceeding, whereas ICWA § 1911(b) explicitly addresses transfer only for foster-care placement and termination-of-parental-rights proceedings. Another commenter claimed there is authority to extend the transfer provisions to preadoptive and adoptive proceedings because such proceedings may occur as part of termination-of-parental-rights proceedings, transfer may be appropriate to provide a higher standard of protection of the rights of the parent or Indian custodian under ICWA § 1921, and ICWA § 1919 allows States and Tribes to enter into agreements to transfer jurisdiction of any child-custody proceeding on a case-by-case basis. Another commenter

asserted that ICWA § 1911 applies to both involuntary and voluntary proceedings, and that, in any case, the biological parent can veto a transfer so that he or she is not forced into a forum foreign to him or her.

Response: Like the statute, the final rule addresses transfer of foster-care-placement and termination-of-parental-rights proceedings. *See* FR § 23.115; 25 U.S.C. 1911(b). And, like the statute, the final rule's provisions addressing transfer apply to both involuntary and voluntary foster-care and termination-of-parental-rights proceedings. This includes termination-of-parental-rights proceedings that may be handled concurrently with adoption proceedings. Parties may request transfer of preadoptive and adoptive placement proceedings, but the standards for addressing such motions are not dictated by ICWA or these regulations. Tribes possess inherent jurisdiction over domestic relations, including the welfare of child citizens of the Tribe, even beyond that authority confirmed in ICWA. *See, e.g., Holyfield*, 490 U.S. at 42 (1989) ("Tribal jurisdiction over Indian child-custody proceedings is not a novelty of the ICWA."); *Fisher v. Dist. Court*, 424 U.S. 382, 389 (1976) (pre-ICWA case recognizing that a Tribal court had exclusive jurisdiction over an adoption proceeding involving Tribal members residing on the reservation). Thus, it may be appropriate to transfer preadoptive and adoptive proceedings involving children residing outside of a reservation to Tribal jurisdiction in particular circumstances.

Comment: Several commenters supported the provision at PR § 23.115 allowing for motions to transfer to be made orally, stating that oral motions are already allowed by court rules and that by explicitly allowing for oral motions in the rule removes a hurdle to making a motion, particularly for parties not represented by counsel.

Response: The final rule retains the provision allowing for the petition to transfer to be made orally because nothing in the Act indicates that a written document would be required. FR § 23.115(a). For the purposes of this rule, an oral petition would be considered "filed" when made on the record.

Comment: One commenter requested specific language to clarify that parents may request transfer to a Tribal court even if the parents live off reservation.

Response: Nothing in the statute or rule limits the right to request transfer to parents who live on reservation. As confirmed by ICWA, Tribes retain authority over the welfare of Tribal children, even when they reside outside of a reservation.

Comment: A few commenters stated their support of the provision providing that transfer can be requested at any stage. A few commenters opposed this provision, stating that a time limit should be imposed. Commenters had various suggestions for time limits to impose on requests for transfer, ranging from, for example, within 30 days of notification to the parents, Indian custodians, and Tribe, to within 6 months of such notification. One commenter suggested a time limit that would allow transfer until the order for foster-care placement or termination of parent rights has been entered. Commenters in support of imposing time limits on transfer stated that:

- Congress implied there is a time limit because, while ICWA § 1911 addresses both transfer and intervention, it allows only for intervention "at any point in a proceeding;"
- ICWA does not allow for transfer after termination of parental rights, so time limits should prevent transfer of an appeal of a foster-care order or termination-of-parental-rights order;

- When jurisdiction is transferred to a Tribe, the Tribe often changes the child's placement. If a child was in the previous placement for a long time and has developed attachments to that placement, this can disrupt those attachments;
- The Supreme Court warned in *Adoptive Couple v. Baby Girl* that parties should not be able to play the "ICWA trump card at the eleventh hour;"
- Allowing transfer at any time rewards "deadbeat" parents who request transfer after a child has been in a placement for an extended period of time, causing extreme trauma for the child for no reason.

Response: The final rule does not establish a deadline or time limit for requesting transfer. It provides that the right to request a transfer is available at any stage in each proceeding. This adheres most closely to the statute, which does not establish any time limits for seeking transfer. Further, the statute indicates Congress's understanding that Tribes would have presumptive jurisdiction over Indian children domiciled outside of a reservation. *See* 25 U.S.C. 1911(b) (the State court shall transfer such proceeding to the jurisdiction of the Tribe unless certain conditions are present); *Holyfield*, 490 U.S. at 49. Establishing time limits for seeking transfer would be contrary to this intent.

The Department's conclusion is also consistent with the general approach that courts take to deciding transfer motions. For example, motions to change venue pursuant to 28 U.S.C. 1404 (the modern version of forum non conveniens where the alternative forum is within the territory of the United States) may be granted at any time during the pendency of the case. *See, e.g., Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); *see also* H.R. Rep. No. 95-1386, at 21 (describing ICWA's transfer provision as a "modified doctrine of

forum non conveniens"). The mere passage of time is not alone a sufficient reason to deny a motion to transfer pursuant to 28 U.S.C. 1404; nor is it for 25 U.S.C. 1911(b).

The Department is cognizant that child-custody matters involve children, for whom there may be special considerations related to the passage of time and the need to minimize disruptions of placements. As discussed elsewhere, the Department disagrees that transfer to Tribal jurisdiction will necessarily entail unwarranted disruption of an Indian child's placement in any particular case. Tribes seek to protect the welfare of the children in their jurisdiction, which may mean in any particular case that a current placement will be temporarily or permanently maintained. Under any circumstances, the Department finds that the strong Federal policy in support of Tribal jurisdiction over Tribal children weighs strongly in favor of no time limits for motions to transfer.

There are also compelling practical reasons for the Department's decision. Although a commenter expressed concern about parents strategically waiting to seek transfer to Tribal court, evidence suggests that opponents of transfer can also behave strategically to thwart transfer. *See, e.g. In the Interest of Tavian B.*, 874 N.W.2d 456, 460 (Neb. 2016) (noting that State dismissed its motion to terminate parental rights to avoid transfer, leaving an Indian child suspended in uncertainty).

And, the Department is aware of child-custody proceedings in which the Tribe intervenes, but does not immediately move to transfer the case because maintaining State-court jurisdiction appears to hold out the most promise for reunification of the family. This may be for any number of reasons, including geographic considerations, or because the State is able to provide specialized services to the parents or child that the Tribe cannot. *See, e.g.*, *In re Interest of Zylena R.*, 825 N.W.2d 173, 183 (Neb. 2013) (discussing that "a Tribe may have no reason to

seek transfer of a foster placement proceeding" but "once the goal becomes termination of parental rights, a Tribe has a strong cultural interest in seeking transfer of that proceeding to tribal court."). A parent may defer moving to transfer a case for similar reasons. The Tribe or parent rationally decides that seeking transfer of a foster-care proceeding would not support the goal of reunification of the Indian child with her parent(s). But once the State abandons this goal, and seeks to terminate parental rights, the Tribe's or parent's calculus might reasonably change. If time limits were imposed for moving to transfer, Tribes might be forced to seek transfer early in a foster-care proceeding, even if that outcome does not facilitate reunification. The Department believes that this would undermine the goals and intent of ICWA, and not produce the best outcomes for Indian children.

For these reasons, the final rule provides that a request for transfer may be made at any stage within each proceeding. *See* FR § 23.115(b). A request for transfer may be denied for "good cause," however, which is discussed elsewhere.

Comment: Several commenters stated that the provision at PR § 23.115(b) providing the right to transfer with "each proceeding" is unclear as to whether it means each child-custody proceeding or each hearing. One commenter supported just stating "any stage of the proceeding" as in PR § 23.115(c) instead.

Response: The final rule clarifies in the definitions that, as relevant here, a "proceeding" is a foster-care-placement or termination-of-parental-rights proceeding, and that each proceeding may include several "hearings," which are judicial sessions to determine issues of fact or of law. *See* FR § 23.2. The final rule permits a party to request transfer at any stage in each proceeding. *See, e.g.*, *In re Interest of Zylena R.*, 825 N.W.2d at 182-84.

Comment: One commenter suggested deleting PR § 23.115(b) and (c) as superfluous.

Response: The final rule deletes proposed paragraph (b) because paragraph (a) already captures that the right to transfer arises with each proceeding, and moves proposed paragraph (c) to final paragraph (b). The final paragraph (b) is necessary to emphasize that the request to transfer may be made at any stage. *See* FR § 23.115.

Comment: A commenter suggested revising PR § 23.115(a) to refer to "jurisdiction of the Tribe" rather than "Tribal court" because in some cases the Tribe may not have a Tribal court.

Response: The final rule incorporates this suggested revision because it more closely matches the statute. *See* FR § 23.115.

Comment: A commenter requested adding the guardian ad litem and child (at a minimum age) to those who may request transfer to Tribal court.

Response: The statute allows petition for transfer by the Indian child's parent, Indian custodian or Tribe only. The statute does not expressly provide for the child to request transfer. *See* 25 U.S.C. 1911(b). State courts, however, may permit motions to transfer from a guardian ad litem and child.

2. Criteria for Ruling on Transfer

Comment: One commenter noted the provision at PR § 23.116 appeared in the 1979 guidelines and is necessary where courts may otherwise deny transfer based on the judge's belief that transfer is not in the child's best interests. A few commenters suggested adding that Tribal jurisdiction is presumed in all ICWA cases because Tribes have concurrent and presumptive jurisdiction when an Indian child is domiciled outside of a reservation. A few commenters suggested stating that the best interests of the Indian child presumptively favor granting the petition for transfer to improve ICWA compliance.

Response: The final rule, like the proposed rule, states that State courts must grant a petition to transfer unless one or more of three criteria are met. This comports with the statute, which states that a State court "shall transfer" unless these specified conditions are present. The final rule does not add the suggested additions because they are not necessary to implement ICWA's transfer provision, which already requires transfer except in specified circumstances.

Comment: A few commenters suggested clarifying that a parent's objection to transfer must be in writing and the consequences of the objection must be explained to the parent, to ensure an informed decision.

Response: The final rule does not impose the suggested limitations on parental objections; however, State courts must document the objection. *See* FR § 23.117(a).

Comment: A few commenters suggested clarifying that a parent whose parental rights have been terminated may not object.

Response: If a parent's parental rights have been terminated and this determination is final, they would no longer be considered a "parent" with a right under these rules to object.

Comment: One Tribal commenter stated that the regulations fail to respond to the ambiguity in § 1911(b), which requires transfer "absent objection by either parent" but has been incorrectly interpreted to require transfer "provided that a parent does not object." This commenter provided several reasons for why ICWA's language does not require a court to deny transfer if a parent objects and stated that the rule should clarify that the court still has the discretion to transfer even if a parent objects.

Response: The final rule mirrors the statute in requiring transfer in the absence of a parent's objection. The House Report states "Either parent is given the right to veto such transfer." H.R. Rep. No. 95-1386, at 21.

Comment: A commenter suggested that the guardian ad litem (where both parents are unfit or unable to consider the welfare of the child) or child himself should have the ability to object to transfer. Another commenter stated that if the child is permitted to object, there should be a minimum age requirement.

Response: The statute specifically addresses objection by "either parent" only; however, nothing prohibits the State court from considering the objection of the guardian ad litem or child himself in determining whether there is good cause to deny transfer, pursuant to the criteria identified in FR § 23.118.

3. Good Cause to Deny Transfer

Comment: Several commenters opposed the proposed rule's approach of defining what factors courts may not consider in determining good cause to deny transfer (*see* PR § 23.117), saying it substitutes BIA's judgment for the courts' judgment, and denies courts the ability to consider every relevant aspect of an individual child's case. One commenter stated that it limits the "good cause" analysis to nothing more than a convenient forum analysis, and that it is beyond BIA's authority to limit the analysis in this way. Another commenter noted that the proposed rule could be interpreted to require a court to transfer to Tribal court every case involving young Indian children where parental rights were terminated.

Several commenters stated that limiting the discretion of State courts to deny transfer of a case to the Tribe was particularly helpful, and clarifies that Tribes have "presumptive jurisdiction" in child-welfare cases. Many commenters recounted their experiences with State courts inappropriately finding "good cause" to deny transfer based on the State court believing the Tribe will make a decision different from the one it would make, because of reliance on bonding with the foster parents, bias against Tribes and Tribal courts, or other reasons, and asked

that the rule help prevent denials on this basis in the future. One commenter noted that State courts sometimes employ a "best interests of the child" analysis in determining whether to transfer jurisdiction, but stated that the question of whether to transfer is a jurisdictional one that should not implicate the best interests of the child, because ICWA recognizes that Tribal courts are fully competent to determine a child's best interests. A few commenters stated their support of the proposed rule's statement that the socioeconomic status of any placement relative to another should not be considered as a basis for good cause to deny transfer because such reasoning has been used in the past.

Response: The limits imposed by the final rule are consistent with the statutory language and congressional intent in enacting ICWA. Congress directed that State courts "shall transfer" proceedings to the jurisdiction of the Tribe unless specified conditions were met. This indicates that Congress intended transfer to be the general rule, not the exception. Congress also intended ICWA, and the transfer provision in particular, to protect the "rights of the child as an Indian" as well as the rights of the Indian parents or custodian and the Tribe. H.R. Rep. No. 95-1386, at 21. If the "good cause" provision is interpreted broadly, or in ways that could permit decision-making that assumes the inferiority of the Tribal forum, congressional intent would be undermined. In keeping with congressional intent, the Department has imposed certain limits on what the court may consider in determining "good cause" to promote consistency in application of the Act and effectuate the Act's purposes. These limits focus on those factors that there is evidence Congress did not wish to be considered, or that have been shown to frustrate the application of 25 U.S.C. 1911(b). State courts retain discretion to determine "good cause," so long as they do not base their good cause finding on one or more of these prohibited considerations.

Comment: A few commenters noted that the 1979 Guidelines identified what State courts could consider in determining whether good cause exists, whereas the regulations now identified what a State court may not consider, leaving open the question of what would qualify as good cause. Several commenters stated that the rule could be strengthened by providing a list of examples of what good cause to deny transfer may resemble. Commenters disagreed on whether the list of examples should be non-exhaustive (to allow for situations not contemplated in the examples) or exhaustive. A few commenters suggested that not stating what may constitute good cause may expand courts' ability to create good cause.

Response: The regulations take the approach of listing what courts must not consider, for the reasons listed above. *See* FR § 23.118. ICWA's legislative history indicates the good cause provision was intended to permit a State court to apply a modified (i.e., limited, narrow) version of the *forum non conveniens* analysis. H.R. Rep. No. 95-1386, at 21. The Department believes that it is most consistent with congressional intent, and will best serve the purposes of ICWA, if State courts retain limited discretion to determine what constitutes good cause to deny transfer. Reliance on the factors identified in the rule, however, would be inconsistent with the purposes of ICWA, and thus is not permitted.

Comment: Several commenters opposed removing "advanced stage" as a "good cause" basis to deny transfer. Among the reasons commenters stated for this opposition were the following:

- The rule radically departs from the prior guidelines, which explicitly allowed consideration of whether the proceeding was at an advanced stage;
- State courts should be able to consider whether the proceeding is at an advanced stage for good policy reasons—to prevent forum shopping (i.e., waiting until the ruling becomes

clear and then, if it is unfavorable, seeking transfer) and to prevent harm to the child (from disruption in placement and delay in permanency);

- Timeliness is a proven weapon against disruption caused by negligence or obstructionist tactics;
- Not allowing consideration of whether the case is at an advanced stage violates the Indian child's right to permanency;
- The rule is inconsistent with ASFA-mandated permanency deadlines, which have been the basis of policy established by appellate courts in dozens of states to interpret "good cause" under advanced stage principles;
- State courts have overwhelmingly agreed good cause may exist if the proceeding is at an advanced stage, but merely disagreed regarding what is "advanced stage," so the rule will increase litigation and delays in case resolution;
- It was not Congress's intent to authorize late transfers and congressional intent has not changed;
- Congress could have expressly allowed transfer at any point in the proceeding in § 1911(b), as it did for intervention in § 1911(c), but it did not;
- Late transfers are more disruptive than late interventions, because a transfer may require retrying the entire case whereas problems resulting from a late intervention are primarily those of the intervener;
- If courts are precluded from considering the "advanced stage" they should at least be able to consider as good cause any "unjustifiable delay" in requesting transfer; otherwise, the rule incentivizes delay until the outcome in the original proceeding becomes clear.

Several commenters supported restricting State courts from considering whether a case is at an "advanced stage" as a "good cause" basis to deny transfer. Among the reasons stated for this support were the following:

- ICWA does not specify any time limits on transferring to Tribal court;
- The 1979 Guidelines' provision allowing consideration of the "advanced stage of the proceedings" as good cause to deny transfer caused confusion among courts and resulted in disparate interpretations because there is no consistent understanding of "advanced stage" across the States (e.g., one court held just over 2 months into a proceeding was "advanced stage");
- Each of the four ICWA-defined proceedings should be reviewed anew, so that a petition to transfer filed late in a foster-care proceeding would be considered early for an adoptive placement and State proceedings do not perfectly map to the ICWA-defined proceedings;
- There are a myriad of reasons a Tribe may wait to transfer a case to their own jurisdiction, including allowing sufficient time to do the work necessary to determine whether to transfer, or waiting until the termination of parental rights stage because the Tribe works with the State or monitors the case before that time to promote family reunification.

One commenter shared a story of a State court denying transfer on the basis that the case was at an advanced stage, even though the Tribe did not learn about the case until that stage.

Response: While the 1979 guidelines explicitly allowed consideration of whether the case was at an advanced stage as good cause to deny transfer, the final rule prohibits reliance on the advanced stage of the proceeding in circumstances where the Indian parent, custodian, or Tribe did not receive notice until the proceeding was at an advanced stage. The Department is

including this requirement to address circumstances in which denying transfer is unfair, and undermines ICWA's goals. Specifically, as pointed out by a commenter, there have been situations where a parent, Indian custodian, or the child's Tribe did not receive timely notice, and then seeks to transfer the proceeding shortly after receiving notice, but the State court denies the petition to transfer based on the case being at an "advanced stage." The final rule ensures that parents, custodians, and Tribes who were disadvantaged by noncompliance with ICWA's notice provisions may still have a meaningful opportunity to seek transfer. This provision should also serve as an incentive for States to provide the required notice promptly. *See* FR § 23.117(c).

While ICWA does not establish a time limit on the opportunity to transfer or expressly allow for transfer at any point in the proceeding, it does expressly allow for intervention at any point in the proceeding. One of the rights of an intervenor is to seek transfer of the proceeding. To effectuate rights to notice in § 1912(a) and rights to intervene in § 1911(c), State courts should allow a request for transfer within a reasonable time after intervention.

The final rule also clarifies that "advanced stage" refers to the proceeding, rather than the case as a whole. Each individual proceeding will culminate in an order, so "advanced stage" is a measurement of the stage within each proceeding. This allows Tribes to wait until the termination-of-parental-rights proceeding to request a transfer to Tribal court, because the parents, Indian custodian, and Tribe must receive notice of each proceeding. The Department recognizes that it is often at the termination-of-parental-rights stage that factors that may have dissuaded a Tribe from taking an active role in the case (such as the State's efforts to reunite a child with her nearby parent) change in ways that may warrant reconsidering transfer of the case. *See, e.g.*, *Zylena R.*, 825 N.W.2d at 183 (Neb. 2013).

Comment: A State commenter stated that litigation over whether a State court may consider, in its good cause determination, whether the proceeding is at an "advanced stage" is causing delays, which are, in turn, delaying permanency for children and putting the State in a position of not being able to meet required permanency timelines.

Response: The final rule aims to reduce litigation over determinations as to whether a proceeding is at an "advanced stage" by establishing clearer standards for when this factor may not be considered. Expeditious transfer does not delay permanency for a child.

Comment: A few commenters opposed not including the child's contacts with the reservation as a basis for good cause to deny transfer, noting that the 1979 Guidelines included this factor and that transferring a child's case to a court with which the child has no connection does not serve the child well. Another commenter supported removing this provision noting that young children would not have evidence of involvement with a Tribe at that age anyway.

Response: As noted above, the final rule establishes that the court must not consider a child's cultural connections with the Tribe or reservation in determining whether there is good cause to deny transfer. State courts are ill-equipped to make this assessment, and young children are unlikely to have had the opportunity to develop such connections.

Comment: Several commenters opposed restricting State courts from considering whether there will be a change in placement, for the following reasons:

- Restricting courts from considering whether there will be a change in placement effectively restricts the court from considering the impact on the child of the transfer;
- Legally, it is impossible to separate jurisdiction and custody, because once jurisdiction is transferred to a Tribe, only the Tribe has jurisdiction over the child's custody;

- Transferring jurisdiction to a Tribe but retaining the child's placement raises legal and practical questions about whether the court has jurisdiction over caregivers, to monitor the care provided to the child, and to determine if the child is subject to new abuse or neglect;
- Many courts have held that the child's best interests may be considered in determining whether good cause to deny transfer exists;
- Not allowing the court to consider whether a transfer would result in a placement change violates the child's equal protection rights and is detrimental to the child;
- Best practices in child-welfare proceedings direct that children should have minimal changes in placement.

Response: The final rule provides that the State court must not consider, in its decision as to whether there is good cause to deny transfer to the Tribal court, whether the Tribal court could change the child's placement. This is an inappropriate consideration because it would presume a decision that the Tribal court has not yet made. *See* FR § 23.118(c)(3). A transfer to Tribal court does not automatically mean a change in placement; the Tribal court will consider each case on and individualized basis and determine what is best for that child. Some commenters erroneously assume that Tribal courts and social services agencies do not follow "best practices in child-welfare proceedings" regarding changes in a child's placement.

The Department also declines to accept the comments recommending that State courts be permitted to consider whether transfer could result in change of placement because the Department has concluded it is not appropriate to grant or deny transfer based on predictions of how a particular Tribal court might rule in the case. *See e.g., Piper Aircraft Co. v. Reyno*, 454

U.S. 235, 261 (1981) (holding that the "Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens*").

For similar reasons, the Department does not find the equal protection concerns raised by commenters compelling. The transfer decision should focus on which jurisdiction is best-positioned to make decisions in the child's custody proceeding. ICWA—and the Department's experience—establishes that Tribal courts are presumptively well-positioned to address the welfare of Tribal children. State courts retain limited discretion under the statute but the choice between two court systems does not raise equal protection concerns. *See, e.g. United States v. Antelope*, 430 U.S. 641 (1977).

Finally, the Department does not find these concerns compelling because even if a child-custody proceeding remains in State court, the State court must still follow ICWA's placement preferences (or find good cause to deviate from them). If there is an extended family or Tribal placement that the parties believe that the Tribal court is likely to consider and perhaps choose, the State court must consider that placement as well.

Comment: One commenter suggested prohibiting consideration of whether transfer "could" result in a change in placement, rather than "would" result because it can be the mere "fear" by a State-court judge of the potential change that leads to denial of transfer.

Response: The final rule incorporates this suggestion because the State court will not know whether, once the proceeding is transferred, the Tribal court would decide to change the placement.

Comment: A commenter noted that the issue in deciding whether there is good cause to deny transfer is not what is best for the child, but who should be making decisions about what is

best for the child. This commenter notes that a presumption by State courts that the Tribe cannot or will not act in a child's best interest was one of the reasons ICWA was initially passed.

Response: The Department agrees that ruling on a transfer motion should not involve predicting how Tribal courts may rule in a particular case.

Comment: Several commenters stated their concern that the proposed rule removes from State-court judges the ability to consider the child's best interests in determining whether a case should be transferred. One commenter stated that this is an unwarranted expansion of Tribal authority over children not domiciled in reservations and has the potential to cause grave harm to children.

In contrast, several other commenters suggested the rule should explicitly prohibit State courts from applying the traditional "best interests of the child" analysis in determining whether there is good cause to deny transfer to the Tribe because: (1) this prohibition was included in the Guidelines; (2) ICWA establishes the placement preferences as being in the child's best interest; and (3) leaving best interests to be argued undermines ICWA's goal to overcome bias and determinations based on lack of knowledge of Tribes and Indian children. A few commenters stated that a best interests inquiry is inconsistent with the presumption of Tribal jurisdiction and recognition of Tribal courts as fully competent to protect an Indian child's welfare. Others stated that the regulations establish that transfer is presumptively in the child's best interests.

A commenter suggested inserting a "best interests" analysis that includes consideration of the child's strong interest in having a connection to the child's Tribe, learning the child's culture, being part of the Tribal community, and developing a positive Indian identity. This commenter also requested adding language from the 1979 Guidelines stating that certain facts may indicate

transfer is not in the best interests of the child (e.g., if the child is part of a sibling group with non-Indian children).

Response: The final rule does not include a "best interests" consideration, but does provide other guidance. *See Zylena R.*, 825 N.W.2d at 183 (Neb. 2013) (best interests of child should not be a factor in determining whether there is good cause to deny a transfer motion); *In re A.B.*, 663 N.W.2d 625, 634 (N.D. 2003) (same, collecting cases). In general, the transfer determination should focus on what jurisdiction is best positioned to hear the case. The BIA guidelines also provide additional guidance regarding what factors are appropriate to consider in analyzing whether there is good cause to deny transfer.

Comment: A few commenters suggested the rule should establish a "clear and convincing" standard of evidence for a showing of good cause to deny transfer. The commenters stated that this standard would be appropriate to protect the Tribe's presumptive jurisdiction and promote consistency by preventing State courts from adopting a lesser standard. A few commenters stated that there should be no burden of proof specified for good cause to deny transfer.

Response: The statute does not establish the standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal court. There is, however, a strong trend in State courts to apply a clear and convincing standard of evidence. *See, e.g.*, *In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *In re Armell*, 550 N.E.2d 1060, 1064 (Ill. App. Ct. 1990); *In re S.W.*, 41 P.3d 1003, 1013 (Okla. Civ. App. 2002); *In re T.I.*, 707 N.W.2d 826, 833-34 (S.D. 2005); *Thompson v. Dep't. of Family Servs*, 747 S.E.2d 838 (2013); *People in Interest of J.L.P.*, 870 P.2d 1252 (Colo1994); *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *In re A.P.*, 961 P.2d 706 (1998). The Department declines to establish a Federal standard of

proof at this time, but notes the strong State court approach to this issue is compelling. States are already applying this standard and the Department will consider this issue for future action.

Comment: A few commenters suggested that the rule should allow only States, and not foster or putative adoptive parents, to advance a claim that there is good cause to deny transfer.

Response: Neither the statute nor the rule limit who may advance a claim that there is good cause to deny transfer. State laws or rules of practice may limit the rights of certain individuals to raise such an objection.

Comment: A few commenters suggested additional factors that a State court should not be permitted to consider, including the distance between the State court and any Tribal or BIA social service or judicial systems.

Response: The final rule does not add the suggested factor to the list of items a State court may not consider in determining good cause to deny transfer. If a State court considers distance to the Tribal court, it must also weigh any available accommodations that may address the potential hardships caused by the distance.

Comment: A commenter noted that some of PR § 23.117 reflects what is in current California law, particularly that a court may not consider the socioeconomic conditions and perceived inadequacy of Tribal systems, but asserts that PR § 23.117(c) and (d) would unduly restrict the State judge's discretion by not allowing the judge to consider exceptional circumstances relating to the Indian child's welfare.

Response: The regulation's limitations on what may be considered in the "good cause" determination do not limit State judges from considering some exceptional circumstance as the basis of good cause. However, the "good cause" determination whether to deny transfer to Tribal

court should address which court will adjudicate the child-custody proceeding, not the anticipated outcome of that proceeding.

4. What Happens When Petition for Transfer Is Made

Comment: A few commenters noted that ICWA does not require the Tribe to affirmatively accept jurisdiction before transfer. One of these commenters suggested revising PR § 23.118(a) to mirror the statutory provision at § 1911(b) stating that the State court "shall transfer… subject to declination by the tribal court."

Response: The rule requires prompt notification to the Tribal court of the transfer petition, and permits a court to request a response regarding whether the Tribal court wishes to decline the transfer. FR § 23.116. As a practical matter, the State and Tribal courts must communicate regarding whether the Tribal court will accept jurisdiction in order to facilitate a smooth transfer and protect the Indian child and minimize disruption of services to the family. *See* FR § 23.119

Comment: A few commenters opposed the proposed provision allowing the Tribe 20 days to decide to accept transfer, noting that ICWA does not mandate a timeframe for Tribal response and that Tribal court scheduling may occur less frequently.

Response: The final rule deletes the proposed provision allowing the Tribe 20 days to decide to accept transfer, and instead specifies that the State court may request a timely response form the Tribe. The Tribe has a statutory right to decline (or accept) jurisdiction, without a statutorily mandated timeline. The Department, however, believes that Tribal courts will respond in a timely manner, recognizing the need for expediently addressing child-welfare issues.

Comment: A few commenters stated that the rule should require the State child-welfare agency to provide a copy of the agency file and additional listed information to the Tribe at no

charge because such documentation is essential to appropriate care decisions and are often not provided to Tribes upon transfer. Another commenter stated that the rule should require the records to be sent to the Tribe at the time the Tribe is requested to make a decision to accept or decline a transfer, so it can make an informed decision.

Response: The final rule combines the provisions in the proposed rule regarding transmission of information from the State court to the Tribal court upon transfer, and provides that the State court should expeditiously provide to the Tribal court all records regarding the proceeding. *See* FR § 23.119. In addition, State agencies should share records with Tribal agencies as they would other governmental jurisdictions, presumably at no charge, under the ICWA provision requiring mutual full faith and credit be given to each jurisdiction's records. *See* 25 U.S.C. 1911(d).

Comment: A commenter stated that the rule should instruct the State court to follow procedures for transfer as dictated by the Tribe.

Response: Once the State court determines that it must transfer to Tribal court, the State court and Tribal court should communicate to agree to procedures for the transfer to ensure that the transfer of the proceeding minimizes disruptions to the child and to services provided to the family.

Comment: One Tribal commenter stated that the rule should require the State court to send notice of request to transfer to the designated ICWA office rather than the Tribal court because there may be multiple Tribal courts.

Response: As discussed above, if the State court does not have contact information for the Tribal court, it should contact the Tribe's ICWA officer.

K. Adjudication

1. Access to Reports and Records

ICWA and these rules require that access to certain records be provided to certain parties. For example, ICWA provides that each party to an ICWA foster-care-placement or termination-of-parental-rights proceeding has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. 25 U.S.C. 1912(c); FR § 23.134. In order to comport with due process requirements, the final rule also extends this right to parties to emergency proceedings. FR § 23.134. Tribes that are parties to such proceedings are entitled to receipt of the documents upon which a decision may be based. In addition, the notice provisions of FR § 23.111(d) require that Tribes be provided the document by which the child-custody proceeding was initiated (as well as other information), and FR § 23.141 requires that States make available to an Indian child's Tribe the placement records for that child's child-welfare proceedings.

Comment: A few commenters suggested clarifying that the child's Tribe has the right to timely receipt of documents filed with the court or upon which a decision may be based. One stated that such access is necessary for the Tribe to determine whether to intervene. Two Tribes stated that States refuse them access to information on the basis of confidentiality.

Response: States cannot refuse to provide an Indian child's Tribe with access to information about that child's proceedings. ICWA expressly provides for Tribal access to certain records, and makes no exception for confidentiality concerns (which presumably are present in all child-custody proceedings). Tribes are sovereign entities that have concurrent jurisdiction over child-custody proceedings, and they should have the ability to review documents relevant to those proceedings. Further, the Indian Child Protection and Family Violence Protection Act addresses this concern, providing that State agencies that investigate and treat incidents of child

abuse should provide information and records to Tribal agencies that need to know the information in performance of their duties to the same extent they would provide the information and records to Federal agencies. 25 U.S.C. 3205. Therefore, confidentiality generally is not a valid basis to withhold information and records to the Indian child's Tribe. The rule does not incorporate this provision because it is not unique to ICWA implementation.

Comment: One commenter stated the rule should clarify that Tribes have a right to both discovery and disclosure of every document, and should not be required to pay for photocopying of documents that other parties receive.

Response: State agencies must share records with Tribal agencies that are parties to child-custody cases as they would other parties and governmental entities. The rule does not, however, address payment of such charges, as the issue is not addressed in the statute.

Comment: One commenter requested the rule require States to allow Tribes at least three business days to review records.

Response: The statute does not require States to provide Tribes with a certain time period for reviewing records, but all parties should be provided sufficient time to review the records to allow for meaningful participation in the proceeding.

Comment: One commenter opposed PR § 23.119(b) (the court's decisions must be based only upon documents in the record), because it suggests that agreed orders entered into between the parties could not be off the record or ex parte, despite local practice and State statutory authority, and could overload State courts by requiring all cases to be heard on the record.

Response: ICWA requires clear and convincing evidence for foster-care placements and evidence beyond a reasonable doubt for termination of parental rights, each of which would

necessarily require documentation in the record. This does not foreclose agreed orders, but the court must still make the statutorily required findings.

2. Standard of Evidence for Foster-care placement and Termination

a. Standard of Evidence for Foster-care placement

Comment: Several commenters supported PR § 23.121(a), establishing the standard of evidence applicable to foster-care placement. A few commenters suggested strengthening PR § 23.121(a) and (b) by changing "may not" to "must not" or "shall not" to make it more clearly mandatory. One commenter stated that while "may not" is the phrase used by the statute, it does not depart from the intent of ICWA to use "shall not."

Response: The final rule changes "may not" to "must not" as requested to clarify that the standard of evidence is mandatory.

Comment: Several commenters pointed out that PR § 23.121(a), establishing that the court may not order foster-care placement unless continued custody is likely to result in serious physical damage or harm to the child uses the phrase "serious physical damage or harm to the child" while the statute, at § 1912(e), uses "serious emotional or physical damage to the child." Commenters opposed the omission of "emotional" as beyond the authority granted by the statute. Some assumed this was an inadvertent omission, while others interpreted this as meaning that foster care may not be ordered even where parents are inflicting serious emotional harm on the Indian child.

Response: The proposed rule mistakenly omitted the term "emotional" in PR § 23.121(a) and instead used the term "harm." The final rule more closely tracks the statutory language, using the phrase "serious emotional or physical damage to the child." *See* FR § 23.121(a).

b. Standard of Evidence for Termination

One commenter suggested changing "continued custody of the child by the parent or Indian custodian" in PR § 23.121(b) to "custody of the child by either parent or Indian custodian."

Response: The final rule retains the proposed language stating "continued custody of the child by the parent or Indian custodian" because this is the statutory language. *See* 25 U.S.C. 1912(f), FR § 23.121(b).

c. Causal Relationship

Comment: One commenter noted that PR § 23.121(c) requires a showing of a relationship between particular conditions but it does not say in the second item how these conditions relate. The commenter suggested clarifying in both (c) and (d), that the actions are directly putting the children in danger. A commenter noted that the word "between" is confusing in PR § 23.121(c).

Response: The final rule addresses the commenters' concerns by revising the language to clarify that there must be a causal relationship between the particular conditions in the home and the risk of serious emotional or physical damage to the child. *See* FR § 23.121(c).

Comment: A commenter stated that the requirement for a causal relationship should apply to both clear and convincing evidence for foster-care placement and beyond a reasonable doubt for termination of parental rights because the statute establishes these evidentiary standards in mirroring provisions.

Response: The final rule requires the causal relationship for both clear and convincing evidence for foster-care placement and beyond a reasonable doubt for termination of parental rights. *See* FR § 23.121(c).

Comment: A few commenters suggested that "particular conditions in the home" should be "particular conditions in the home listed in the petition" because the petition should include all the allegations.

Response: The final rule does not add that the conditions must be listed in the petition because evidentiary requirements that are not unique to ICWA govern what allegations must be included in the petition. *See* FR § 23.121(c).

Comment: A commenter suggested replacing "conditions in the home" with "facts" to prevent exclusion of facts such as a parent's propensity to abuse the child, as opposed to the living conditions.

Response: The final rule retains the phrase "conditions in the home" because this phrase generally indicates all conditions of the child's home life rather than just the physical location. This phrase was also used in the 1979 Guidelines. *See* FR § 23.121(c).

d. Single Factor

Comment: Several commenters expressed concern regarding PR § 23.121(d), which states that one of the listed factors may not, of itself, meet the burden of evidence. A few stated that the proposed rule presumes States routinely remove children solely on the basis of poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior, when in fact they do not. One commenter expressed concern that PR § 23.121(d) is dangerous, because one could argue that where both parents are abusing and producing drugs, the evidence shows only the existence of inadequate housing and substance abuse, which cannot meet the burden of evidence. Another commenter noted that substance abuse is a significant contributing factor to child abuse and neglect, and asserted that excluding substance abuse from evidence fails to protect the child. Another commenter stated that Congress

never suggested alcohol or substance abuse that harms Indian children was not a sufficient reason for removing Indian children. A commenter stated that not allowing a judge to consider substance abuse or nonconforming social behavior takes away the court's power to protect Indian children.

Response: The final rule does not prohibit State courts from considering the factors. Instead, the final rule prohibits relying on any one of these factors, absent the causal connection identified in FR § 23.121(c), as the sole basis for determining that clear and convincing evidence or evidence beyond a reasonable doubt support a conclusion that continued custody is likely to result in serious emotional or physical damage to the child. *See* FR § 23.121(d). The intention behind this provision is to address the types of situations identified in the statute's legislative history where States remove Indian children at higher rates than they remove non-Indian children based on subjective assessments of these factors. To address the commenters' concerns that this provision may prevent State courts from protecting Indian children, the final rule addresses this comment by stating that a court may not consider any one of these factors unless there is a causal relationship between the factor and the damage to the child. In other words, if one of these factors is causing the likelihood of serious emotional or physical harm to the Indian child, the court may rely on the factor.

Comment: One commenter suggested defining or giving examples of "nonconforming social behavior" in the provision stating that evidence of nonconforming behavior by itself is not evidence that continued custody is likely to result in serious emotional or physical damage to the child.

Response: The final rule does not define the term, but the Department notes that "nonconforming social behavior" includes behaviors that do not comply with society's norms,

such as dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations. *See* FR § 23.121(d).

Comment: A commenter stated that the list of factors in PR § 23.121(d) should not be sufficient for evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child, in addition to not being sufficient for clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child.

Response: The final rule adds "beyond a reasonable doubt" as requested. *See* FR § 23.121(d).

3. Qualified Expert Witness

The Act requires the testimony of qualified expert witnesses for foster-care placement and for adoptive placements. 25 U.S.C. 1912(e), (f). The final rule provides the Department's interpretation of this requirement. *See* FR § 23.122.

The legislative history of the qualified expert witness provisions emphasizes that the qualified expert witness should have particular expertise. Congress noted that "[t]he phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications." H.R Rep. No. 95-1386, at 22. In addition, a prior version of the legislation called for testimony by "qualified professional witnesses" or a "qualified physician." *See* S. Rep. No. 95-597, at 21.

The final rule requires that the qualified expert witness must be qualified to testify regarding whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. FR § 23.122(a). This requirement flows from the language of the statute requiring a determination, supported by evidence …,

including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. 1912(e), (f).

In addition, the qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe. FR § 23.122(a). In passing ICWA, Congress wanted to make sure that Indian child-welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Holyfield*, 490 U.S. at 36 (citing H.R. Rep. No. 95-1386, at 24). Congress recognized that States have failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. *See* 25 U.S.C. 1901(5). Accordingly, expert testimony presented to State courts should reflect and be informed by those cultural and social standards. This ensures that relevant cultural information is provided to the court and that the expert testimony is contextualized within the Tribe's social and cultural standards. Thus, the Department believes that the question of whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child is one that should be examined in the context of the prevailing cultural and social standards of the Indian child's Tribe.

The final rule does not, however, strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. FR § 23.122(a). The Department recognizes that there may be certain circumstances where a qualified expert witness need not have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe in order to meet the statutory standard. For example, a leading expert on issues regarding sexual abuse of children may not need to know about specific Tribal social

and cultural standards in order to testify as a qualified expert witness regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child. Thus, while a qualified expert witness should normally be required to have knowledge of Tribal social and cultural standards, that may not be necessary if such knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. A more stringent standard may, of course, be set by State law.

Comment: Several commenters supported the proposed rule's requirement in PR § 23.122 for the qualified expert witness to have knowledge of the prevailing social and cultural standards and childrearing practices within the child's Tribe and prioritizing use of experts who are members of the child's Tribe and recognized by the Tribal community as knowledgeable in Tribal customs. A few commenters stated that this ensures cultural information is provided to the court and avoids increasing use of non-Indian professionals without experience or knowledge in Indian families. A few commenters noted that expert witness testimony has been provided by those without any knowledge of Indian family customs or based on information gleaned from the Tribe's website; these commenters supported the proposed rule for addressing this issue. A commenter supported the definition of qualified expert witness in PR § 23.122 as consistent with the way the term has been defined in various State statutes implementing ICWA, in various Tribal-State agreements, and in accordance with ICWA's intent.

Several other commenters stated that the proposed provisions addressing who may serve as a qualified expert witness are beyond the Department's authority. Other commenters stated that the Department is within its purview to define who may be considered as a qualified expert witness in ICWA cases because the statute requires qualified expert witnesses but does not define the term.

Several commenters objected to PR § 23.122, stating that it commandeers State courts by telling them who may serve as expert witnesses and that, instead, State-court judges should determine what expert testimony is credible and reliable based on rules of evidence. A few other commenters stated that the rule conflicts with established rules of evidence because questions of bias and prejudice go to the weight, not the admissibility, of evidence. These commenters note that concerns as to bias and prejudice can be addressed through impeachment in cross-examination.

Response: The Act is ambiguous regarding who is a "qualified expert witnesses." Thus, as discussed above, the final rule provides the Department's interpretation of this requirement. *See* FR § 23.122. Providing State courts with this regulatory language will promote uniformity of the application of ICWA.

As discussed above, the Department emphasizes that qualified expert witnesses must have particular relevant expertise and should have knowledge of the prevailing social and cultural standards of the Indian child's Tribe. These are not issues of bias or prejudice; rather, they are issues of the knowledge that the expert should have in order to offer her testimony. The final rule still provides State courts with discretion to determine what qualifications are necessary in any particular case.

Comment: A few commenters noted that ICWA does not require the qualified expert witness have specific knowledge of the Tribe's culture or customs. A commenter stated that Congress said the phrase was meant to apply to expertise beyond "normal social worker qualifications" but did not impose additional requirements for knowledge of the Tribe's culture and customs. This commenter also noted that numerous courts have ruled that, if cultural bias is not implicated in the testimony or proceeding, then the expert witness is not required to have

experience with or knowledge of the Indian culture. A few commenters pointed to case law holding that specialized knowledge of Indian culture is not necessary for a person to be qualified as an expert in an ICWA case, and State law controls who is recognized as an expert.

A few commenters pointed out the purpose of the requirement for qualified expert witness testimony and stated that Congress intended to prevent removal of Indian children due to cultural misunderstandings, poverty, or different standards of living. Another stated that Congress was trying to address social workers improperly basing findings of neglect and abandonment on factors such as the care of Indian children by extended family members, Indian parents' permissive discipline, and unequal considerations of alcohol abuse.

Response: As discussed above, the final rule states that a qualified expert witness should have an understanding of the child's Tribe's cultural and social standards. However, the final rule still provides State courts with discretion to determine what qualifications are necessary in any particular case. State law may also provide standards for qualified expert witnesses that are more protective of the rights of the Indian child and parents.

Comment: One commenter noted that the requirement for specific knowledge of the Tribe applies even if the child has never been involved in the Tribe's customs or culture. A commenter asserted it would be unfair to a child that has no connection to the Tribe's customs or culture to require a Tribal expert witness. One commenter stated that it does not take an expert with specific knowledge of Indian culture to provide helpful information to the court, so long as the expert has substantial education and experience and testifies on matters not implicating cultural bias. This commenter stated that the requirement for an expert with special knowledge of Indian life is unreasonable when an agency seeks action on any ground not pertaining to the child's

heritage. A few commenters pointed to case law holding that when cultural bias is not clearly implicated, the qualified expert witness need not have specialized knowledge of Indian culture.

Response: As discussed above, the final rule states that a qualified expert witness should have an understanding of the child's Tribe's cultural and social standards. The child's involvement with Tribal customs and culture is not relevant to an inquiry that focuses on the ability of the parent to maintain custody of their child.

There may be limited circumstances where this knowledge is plainly irrelevant to the question whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and the final rule allows for this. The Department disagrees, however, with the commenters' suggestion that State courts or agencies are well-positioned to assess when cultural biases or lack of knowledge is, or is not, implicated. ICWA was enacted in recognition of the fact that the opposite is generally true. Indeed, as other commenters have pointed out, some theories, such as certain bonding and attachment theories, presented by experts in foster-care, termination-of-parental-rights, and adoption proceedings are based on Western or Euro-American cultural norms and may have little application outside that context. *See, e.g.*, Comments of Casey Family Programs, at pp 13-17.

Comment: Several commenters opposed restricting expert testimony since it could prevent courts from receiving relevant information. Commenters also stated that limitations on expert evidence would cause harm and prevent positive outcomes for many children. A commenter noted that the proposed rule's requirements improperly allow the Tribe to dictate who the State can call as an expert witness in their own case-in-chief. This commenter stated that the Tribe as a party may call their own witnesses and cross-examine the State's expert and should have the responsibility to present evidence. A few commenters noted that the regulations

do not limit the number of expert witnesses at a hearing but ensures the court has all the information it needs to make culturally informed decisions. These commenters state that the proposed rule requires the State to find someone who agrees with the foster-care placement or termination of parental rights after reviewing the case from the perspective of the child's culture and community, to ensure that the cultural norms of the child's Tribe are considered. Other commenters stated that the proposed rule restricts testimony from psychological experts in trauma, attachment, developmental psychology, etc., unless they also have knowledge of the specific Tribe's customs. Several commenters requested clarification that these requirements do not preclude State courts from hearing testimony from other expert witnesses in addition to the expert on the Tribe's culture and customs as they pertain to childrearing. A few commenters noted that a primary policy underlying ICWA was to protect the best interest of Indian children, but the proposed rule provides no qualification for experts who can speak to the best interests of the child. These commenters state that any such expert should be given priority regardless of whether the expert is from a Tribe.

Response: The rule does not restrict expert testimony. The court may accept expert testimony from any number of witnesses, including from multiple qualified expert witnesses. The statute requires, however, that the proposed foster-care placement or termination of parental rights be supported by the testimony of qualified expert witnesses.

Comment: Several commenters noted the difficulty in obtaining expert witnesses with specific knowledge of the Tribe's culture and customs who are willing to testify. One noted that, in California, due to the historical relocation policies, finding an expert can be a challenge. These commenters were concerned that the difficulties in securing qualified expert witnesses could delay permanency decisions. Suggested solutions to this issue included:

- Allowing regional experts (particularly in Alaska, where it may not be possible to find experts in each unique village or Tribe that can be available at hundreds of hearings held each year);
- Providing guidance for finding witnesses from out-of-State Tribes;
- Applying expert witness requirements only when the child is domiciled on or residing on the reservation because otherwise it is difficult to locate an impartial qualified expert witness with specific knowledge of the Tribe's culture and customs;
- Requiring Tribes to respond to requests to provide an expert, or to relieve the agency of the obligation to identify a Tribal expert if the Tribe fails to respond;
- Requiring BIA provide a list of qualified expert witnesses.

Response: The Department encourages States to work with Tribes to obtain a qualified expert witness. In some instances, it may be appropriate to accept an expert with knowledge of the customs and standards of closely related Tribes. Parties may also contact the BIA for assistance. *See* 25 CFR § 23.81.

Comment: A commenter noted that the evidentiary issue before the court is whether the child is at risk of serious emotional or physical damage, and that the new definition does not require the expert witness to have any knowledge, education, or qualification on that issue. This commenter noted that knowledge of the Tribe's culture and customs can inform an expert's opinion but that is secondary to the expert's ability to address the main issue.

Response: The final rule states that the testimony of at least one qualified expert witness must address the issue of whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Comment: A few commenters supported the preference list of qualified expert witnesses. A few commenters suggested redrafting PR § 23.122(b) to clarify that the presumption is in descending order, to read "The [qualified expert witness] shall be determined in the following order of preference." One commenter stated that the preference order is important because in some counties, the State worker is accepted as an expert witness to circumvent the Tribe's opinion, if it is known that the Tribe has an opposing opinion.

A few commenters opposed listing a member of the child's Tribe recognized as knowledgeable in Tribal customs or childrearing as the first preference because choosing a layperson over a professional would be choosing that Tribe's cultural opinion over an educated person who can provide evidence-based testimony.

A few commenters opposed the priority given to professionals with substantial experience and education in his or her specialty being below the priority of Tribal members of the child's or another Tribe, and laypersons with knowledge of the Tribe's cultural and childrearing practices. These commenters stated that the priorities essentially eliminate the input of licensed child-welfare experts, and could jeopardize the safety and wellbeing of the children.

One commenter stated that the fourth preference should be removed because a non-Native anthropologist will likely not understand the culture and traditions of Tribes. This commenter recommends instead adding language similar to three, saying that a layperson who is recognized by the child's Tribe in having substantial experience.

A commenter opposed ranking at all because the trier of fact should determine what weight to give to testimony, and by ranking, it implies the higher ranked expert would be more reliable or credible.

Response: The final rule does not include a preference list of qualified expert witnesses. Instead it requires that the qualified expert witnesses be able to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and that the qualified expert witnesses should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. The final rule also allows a Tribe to designate a person as being qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.

Comment: A few commenters expressed concern that a witness in the proposed order of preference would be biased, because a member of the Tribe would not oppose the Tribe's position.

Response: The final rule does not require that the qualified expert witness be a citizen of the Tribe. The witness should be able to demonstrate knowledge of the prevailing social and cultural standards of the Indian child's Tribe or be designated by a Tribe as having such knowledge. *See* FR § 23.122(a), (b).

Comment: One commenter suggested considering Native elders knowledgeable about ICWA and the family's heritage, etc., as qualified expert witnesses.

Response: Any potential qualified expert witness, including Native elders, would need to meet the requirements of FR § 23.122 to testify on whether continued custody is likely to result in serious emotional or physical damage to the child. The court may allow experts to testify for other purposes as well.

Comment: Several commenters suggested further improving the regulation by providing that the Tribe will designate and authorize the expert witness. Several other commenters requested clarification that, while the Tribe may assist in locating an expert, it is under no

obligation to do and that the Tribe's failure to do so does not absolve the State of its obligation. A few other commenters requested requiring the State to seek assistance from the Tribe or the BIA agency if the Tribe is unable to be contacted. Another commenter noted that the Tribe is often the State's opposing party, so it shouldn't be required to seek assistance from the Tribe.

Response: The final rule provides that the court or any party may request the assistance of the Indian child's Tribe or the BIA agency serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses. This is not required.

Comment: Several commenters requested a new provision prohibiting the qualified expert witness from being employed by the State agency due to a concern about the potential that the State worker may have a bias, and noting that the original intent of the requirement for a qualified expert witness was to combat such bias. Others requested the prohibition be extended to private agencies and Federal agencies. These commenters stated that it is a conflict of interest, or at least the appearance of impropriety, for the agency seeking placement to claim to be an expert in whether the child should be placed.

Response: The final rule adds a provision prohibiting the social worker that is regularly assigned to the child from serving as the qualified expert witness, to help to address concerns regarding bias or conflicts. In addition, this provision reflects the congressional direction that "[t]he phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications." H.R. Rep. No. 95-1386, at 22.

Comment: One commenter noted that because the standard of evidence for foster-care placement and termination of parental rights hinges on harm to the child, the qualified expert should be someone familiar with the child, not just the Tribe. A commenter suggested requiring the qualified expert witness to make contact with the parents and make an effort to view

interactions between the parents and child, and attempt to meet with extended family members involved in the child's life. Otherwise, the expert will rely on one-sided State reports.

Response: The commenter's suggestions are recommended practices.

L. Voluntary Proceedings

Certain ICWA requirements apply to voluntary proceedings. The statute defines "child-custody proceeding" broadly to include foster-care, preadoptive, and adoptive placements, without regard to whether those placements are made with or without the consent of the parent(s). 25 U.S.C. 1903(1). Similarly, termination-of-parental-rights proceedings fall within the statutory definition whether or not the termination is voluntary or involuntary. *Id.*

The statute does not condition Tribal court jurisdiction over Indian child-custody proceedings on whether that proceeding is voluntary or involuntary. Rather, exclusive Tribal jurisdiction is recognized over any child-custody proceeding involving an Indian child who resides or is domiciled within the reservation of the Tribe under 25 U.S.C. 1911(a). *See also generally Holyfield.* Transfer and intervention rights apply in any State court proceeding for the foster-care placement of, or termination of parental rights to, an Indian child. 25 U.S.C. 1911(b), (c). Similarly, § 1915 of the statute provides placement preferences that apply in any adoptive placement of an Indian child under State law, without specifying whether that adoption is the result of a voluntary or involuntary termination of parental rights. And, § 1913 of the statute specifically addresses voluntary proceedings, and provides a number of significant protections to parents.

The Department is cognizant that voluntary proceedings require consideration of the interests of the Indian child's biological parents to direct the care, custody, and control of their child. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000). The rights of the child, including the

rights of the child as an Indian, must also be considered. State and Tribal governments also have a sovereign interest in protecting the welfare of the child. And Congress has articulated a clear Federal interest in protecting Indian children and the survival of Tribes. State law varies in how these various interests are considered and protected.

ICWA balances these important and sometimes competing considerations. It recognizes that Tribes have exclusive jurisdiction over child-custody proceedings involving children domiciled on the reservation, and the right to seek transfer or intervene in foster-care or termination-of-parental rights proceedings involving off-reservation children. The final rule retains this balance, and makes clear that ICWA's placement preferences apply to voluntary placements, but also permits departure from those preferences based on various factors, including the request of one or both parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference. FR § 23.132(c). This balances the importance of the placement preferences with the rights of the parent.

For clarity, the final rule indicates in FR § 23.104 which provisions apply to voluntary proceedings. The final rule also provides specific standards for voluntary proceedings. In particular:

- Section 23.124(a) and (b) provide the minimum requirements for State courts to determine whether the child is an "Indian child" as defined by statute. If there is reason to believe that the child is an "Indian child," but this cannot be confirmed based on the evidence before the State court, it must ensure that the party seeking placement sought verification of the Indian child's status with the Tribes of which the child might be a citizen. The determination of whether the child is an "Indian child" is a threshold inquiry; it affects the jurisdiction of the State court and what law applies to the matter before it. *See, e.g., In re A.G.*, 109 P.3d 756, 758 (Mont.

2005) (whether child is an "Indian child" is a "threshold inquiry" and must be definitively resolved before termination of parental rights). Section (a) mirrors the provision in the proposed rule; section (b) was added to clarify the obligation to confirm a child's status as an "Indian child."

- FR § 23.124(c) clarifies that the regulatory provisions addressing the application of the placement preferences apply with equal force to voluntary proceedings.

- The final rule does not include a provision requiring agencies and State courts to provide notice to the Indian Tribe of voluntary proceedings. As a practical matter, notice to the Tribe may be required in order to comply with other provisions of the statute or regulation (*see, e.g.,* FR § 23.124(b)). In the Department's view, it is a best practice to provide such notice.

- FR § 23.125 details how consent must be obtained in a voluntary proceeding, and is designed to ensure that the procedural protections provided by ICWA are implemented in each case. The final rule makes some wording changes from the proposed rule, but is substantively similar.

- FR § 23.126 describes what information a consent document should contain. The final rule makes some wording changes from the proposed rule, but is substantively similar.

- FR § 23.127 describes how withdrawal of consent to a foster-care placement is achieved. It clarifies that the parent or Indian custodian may withdraw consent to foster-care placement at any time; requires the filing of an instrument under oath, and if consent is properly withdrawn, requires the immediate return of the child to the parent or custodian.

- FR § 23.128 addresses withdrawal of consent to termination of parental rights or adoption. The final rule includes termination of parental rights, to better match the statutory provision. *See* 25 U.S.C. 1913(c). The final rule, like the proposed rule, requires that a

withdrawal of consent be filed in court or made by testifying in court, and that after withdrawal of consent is filed, the child must be returned to the parent or Indian custodian.

1. Applicability of ICWA to Voluntary Proceedings – In General

Comment: Several commenters noted and supported the applicability of ICWA to voluntary placements. A commenter stated that the proceedings identified in PR § 23.103(f) (voluntary proceedings in which the parent or Indian custodian may regain custody upon demand) are those that operate outside of the court and child-welfare systems, and that these are distinct from those described in PR § 23.103(g) (in which a parent consents to foster care or termination of parental rights).

Response: Certain provisions of the final rule are applicable to voluntary placements. To clarify which placements are outside of ICWA, the final rule defines "upon demand" to mean verbal demand without any required formalities or contingencies. Section 1913 of the statute (implemented by FR § 23.103(g)) requires formalities for consent and withdrawal of consent of a foster-care placement.

Comment: Several commenters supported PR § 23.103(g) stating that private adoption placements made voluntarily by parents are covered by ICWA. Among the reasons stated in support of this provision were:

- Private adoption placements contribute to the wholesale separation of Indian children from their families, culture and Tribes;
- Indian children are routinely adopted into non-Indian homes through private adoptions because adoption agencies control which homes the birth parents choose from;
- There are hundreds or thousands of Indian homes that would like to adopt Indian children;

- ICWA as a whole does not only pertain to involuntary proceedings.

One Tribe recounted a situation where the Tribe intervened in a voluntary adoption and the Tribal member changed her mind and placed the child with a placement that preserved the child's ties to family, culture, and community.

Response: The final rule clarifies which provisions are applicable to voluntary proceedings. *See e.g.,* FR § 23.104. It balances the interests of biological parents with the Federal policy promoting retention of Indian children within their extended family and Tribal community whenever possible.

Comment: A few commenters stated that the proposed rule treats the child as property of the Tribe, inviting Tribal interference with the parent's right to make decisions.

Response: The rule in no way treats the child as property of the Tribe. Tribes, like other governments, have a sovereign interest in the welfare of their citizens, and in particular, their children. The final rule balances this interest with a parent's interest in directing the care, custody, and control of their child.

2. Applicability of Notice Requirements to Voluntary Proceedings

Comment: Many commenters stated support for the provision of the proposed rule related to notice to Tribes in voluntary proceedings. These commenters noted that Tribes are *parens patriae* for their member children and that, when Tribes do not receive notice in voluntary proceedings they are effectively denied rights and protections granted by ICWA. Specifically, a Tribe must receive prior notice of a voluntary proceeding in order to avail itself of the following statutory rights and protections:

- The opportunity to verify a child is a member, and therefore subject to ICWA;

- The exercise of exclusive Tribal jurisdiction over Indian children who reside or are domiciled within the reservation or who are wards of Tribal court (25 U.S.C. 1911(a));
- The exercise of concurrent jurisdiction over Indian children by transferring the proceeding to Tribal court (25 U.S.C. 1911(b));
- Intervention in voluntary foster-care placement and termination-of-parental-rights proceedings (25 U.S.C. 1911(c));
- The opportunity to provide an interpreter to a parent or Indian custodian (25 U.S.C. 1913(a));
- Monitoring and compliance (filing a petition to invalidate proceedings) (25 U.S.C. 1914);
- Assistance in identifying placements and providing information on "prevailing social and cultural standards" in the Indian community (25 U.S.C. 1915(d));
- Facilitation of documentation of efforts to comply with the order of preference (25 U.S.C. 1915(e)).

A few commenters asserted that the proposed requirement for notice in voluntary proceedings addresses an ambiguity in the statute: the provision at § 1913 addressing consent for voluntary termination does not address how the provision interacts with other provisions of the Act. A few commenters stated that the proposal addresses Congress's concern about both State and private agency adoptions. These commenters assert that birth parents' rights are balanced against the government's interest in the child's safety.

One commenter noted that while the statute explicitly requires notice in involuntary proceedings, it does not preclude notice in voluntary proceedings. Other stated reasons for support of requiring notice in voluntary proceedings were:

- Voluntary adoptions are often used to skirt around ICWA;

- Including the Tribe in voluntary placements will help find suitable placements and lead to placement stability;
- Requiring notice in voluntary proceedings is consistent with several State laws, including California SB 678 and the Oklahoma Indian Child Welfare Act, and Tribal-State agreements, and that nationalization of the requirement ensures equal treatment on the issue across jurisdictions;
- Requiring notice allows the Tribe the opportunity to assist the mother with any situations leading her to feel that she cannot raise her child.

A few commenters suggested adding that the notice to Tribes of voluntary proceedings is to permit the Tribe to determine whether the child involved is an Indian child.

Several other commenters opposed the proposed requirement for notice in voluntary proceedings, stating that it is contrary to the plain language of the statute because the notice provisions at § 1912 apply only to involuntary proceedings and the provisions specific to voluntary proceedings at § 1913 make no mention of notice. These commenters also pointed to case law concluding there is no Tribal right to notice in voluntary proceedings and past congressional attempts to amend ICWA to require this notice as proof that the Act currently does not require such notice.

Several commenters stated that requiring notice in voluntary proceedings violates an individual's rights to privacy and due process, and will result in children not being adopted because the birth parents will be forced into a choice of doing what they believe is best for the child or preserving their constitutionally protected privacy and anonymity. One commenter stated her belief that the birth parent's desire should be paramount. One commenter pointed to

the Supreme Court's decision in *Whalen v. Roe,* 429 U.S. 589 (1977), as protecting parents' right to privacy.

A few commenters stated that the regulations should suggest, rather than mandate, notice in voluntary proceedings because the Act does not require notice but such notice may be advisable to protect the Tribe's right to intervene.

Response: The final rule has been changed from the proposed rule, and does not require in all cases that notice be provided to Tribes of voluntary proceedings. The final rule does require that the court make a determination of whether the child is an "Indian child," because this is essential in order to assess the State court's jurisdiction and what law applies. An inquiry with one or more Tribes may be necessary in some cases to confirm a child's status as an "Indian child." The final rule does not preclude State requirements for notice in voluntary proceedings in other circumstances. The Department recommends that Tribes be provided notice in voluntary proceedings.

Comment: Many commenters opposed the provisions at PR § 23.107(d) stating that a request for anonymity in voluntary proceedings does not relieve the obligation to obtain verification from the Tribe and provide notice. These commenters stated that requiring notice to Tribes in voluntary cases is contrary to the plain language of the statute, because the statute states the court or agency "shall give weight" to the parent's desire for anonymity and nothing in the statute requires notice to Tribes in voluntary proceedings. These commenters also stated that requiring verification and notice in voluntary proceedings even where the parent has expressed a desire for anonymity violates constitutional privacy rights and the non-discrimination provisions of the Multi-Ethnic Placement Act. A few commenters argued that it is good public policy to allow for anonymity without notice to the Tribe and others because removing the option for a

"quiet adoption" will make other options, such as abortion or taking advantage of "safe haven" laws to anonymously abandon a child more desirable.

A few commenters supported this provision and requested adding that a request for anonymity does not relieve the obligation to comply with any other provision of ICWA as well. These commenters stated that Tribes can work within their Tribal systems to keep the information confidential and that these regulations are consistent with the approach taken in some States. One commenter stated that, without this provision, adoption attorneys and agencies that seek to place Indian children with non-Indian families need only tell the parents to request anonymity to enable placement without complying with ICWA. One commenter stated that the link between notice to the Tribe and harm to the parents is attenuated and that the alleged constitutional right to privacy would be an expansion of Supreme Court jurisprudence.

A few commenters specifically addressed PR § 23.107(d)'s requirement that the agency or court keep documents confidential and under seal. A State commenter requested explanation for how it could be possible to keep the documents confidential and under seal while still seeking verification and notice. A few other commenters requested a revision to state that the requirement to keep documents confidential and under seal may not allow the court to deny access to the documents by a Tribe or any party that needs them to fully present their position in the child-custody proceeding. One commenter noted that, just as no parent in a child-custody proceeding has an anonymity interest that supersedes a State's sovereign interest in protecting children, neither does a parent have an anonymity interest that supersedes a Tribe's sovereign interest in protecting children.

Response: As discussed above, the final rule requires notice to Tribes when necessary to determine a child's status as an "Indian child." Tribes, like other governments, are equipped to

keep such inquiries confidential, and the final rule requires this of Tribes. While this inquiry to the Tribe may require the State to share confidential information, this sharing is a government-to-government exchange of information necessary for the government agencies' performance of duties. Tribes are often treated like Federal agencies for the purposes of exchange of confidential information in performance of governmental duties. *See, e.g.*, Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. 3205; Family Rights and Education Protection Act, 20 U.S.C. 1232(g). The final rule balances the rights of the parents to confidentiality with the need to determine the Indian status of the child.

Comment: Several commenters noted that State "safe haven" laws, such as the law in Wisconsin and Minnesota, that allow parents to anonymously relinquish children, undermine ICWA and suggested addressing this issue in the regulations. Some commenters asserted that the Federal ICWA preempts State "safe haven" laws. Others suggested adding a requirement for representatives of safe haven facilities to ask the parents to provide information regarding Tribal affiliation and then inform any agency or court involved.

Response: The operation of State "safe haven" laws is beyond the scope of this rulemaking. Child-custody proceedings involving children relinquished under these laws must still comply with applicable requirements under ICWA and these regulations.

Comment: A few commenters requested clarification that Health Insurance Portability and Accountability Act of 1996 (HIPAA) only applies to medical information and does not apply to information on Tribal affiliation.

Response: These comments are beyond the scope of this rulemaking.

Comment: A few commenters stated that notice is necessary to address situations where the mother places a child voluntarily for adoption, but the proceeding is involuntary to the father.

Response: In situations where a mother voluntarily places an Indian child for adoption, but the proceeding is involuntary to the father, then the involuntary proceedings requirements under § 1912 of the Act apply (e.g., notice, active efforts, evidence beyond a reasonable doubt including the testimony of qualified expert witnesses).

Comment: A few commenters stated that the proposed language applying ICWA to voluntary placements may create barriers when parents agree to out-of-home placements to allow them to engage in informal supervision services that provide intensive support to families to prevent court intervention.

Response: If a parent agrees to out-of-home placement but may not regain custody of the child upon verbal request, the out-of-home placement is a child-custody proceeding, FR § 23.2, and ICWA requirements (for voluntary or involuntary proceedings, as the case may be) are applicable. ICWA establishes minimum Federal standards that require court involvement at certain points.

3. Applicability of Placement Preferences to Voluntary Proceedings

Comment: A few commenters stated their support of the proposed provision clarifying that placement preferences apply to voluntary proceedings. A commenter suggested revisions to clarify that the placement preferences apply to both involuntary and voluntary proceedings because otherwise, parents who proceed through attorneys rather than an "agency" may interpret the provision to apply only to involuntary proceedings.

Many commenters opposed this provision. Commenters in opposition to this provision state that the Tribe's rights should not "trump" the rights of the birth parents to choose what they believe to be the best adoptive placements for their children and what placement they as the parents believe is in the best interests of the child. Commenters stated that the proposed rule

takes away parents' ability to make placement plans for their children. Several commenters asserted that birth parents may choose to perjure themselves to withhold information on Tribal membership, terminate a pregnancy, or may feel forced to parent the child themselves in an undesirable environment because they will not be able to choose the adoptive family, or may ultimately have the child taken away involuntarily. Some stated that this rule will prevent adoptive families from being open to adopting Indian children due to the fear that the Tribe could override the birth parents' choice and take the child away.

Response: The plain language of § 1915(a) of the Act requires that the placement preferences be applied "in any adoptive placement," which includes both voluntary and involuntary adoptive placements, in the absence of good cause to the contrary. The regulation likewise requires that the preferences be applied in both voluntary and involuntary placements, but notes that a basis for good cause to deviate from the placement preferences may be the request of one or both of the parents, if they attest that they have reviewed the placement options that comply with the order of preference. The regulation therefore permits parents to choose a placement for their child that does not comply with the preferences. *See* FR § 23.132(c).

Comment: A few commenters stated that they intentionally chose to disassociate from the Tribe and therefore find it "offensive" that a Tribe could claim their child as a member. One commenter stated that Tribal members who choose not to live on a reservation should not be subject to their Tribal governments making choices for their children, such as where to place their infants for adoption.

Response: Parents who choose to dissociate from the Tribe by not enrolling or by disenrolling (and by not enrolling their child in the Tribe) are not subject to ICWA because the child will not qualify as an "Indian child." If, however, the child is an "Indian child," the Tribe

has a legitimate and federally recognized interest in the welfare of that child and the maintenance of ties to the Tribe. The final rule balances this interest with the interests of parents in directing the care, custody, and control of their child.

Comment: A few commenters stated that looking at what is in the best interest of the child should come before everything else and nobody other than the parents should be able to determine what best interest means to them. These commenters stated that culture should be a consideration but the Tribe should not be able to interfere if the family chooses a non-preferred adoptive placement. Commenters also stated that birth mothers of Indian children should have the same rights as all other birth mothers under the Constitution to choose who will raise the child. A few commenters cited Supreme Court cases addressing constitutional rights with respect to family autonomy. *See, e.g., Troxel*, 530 U.S. at 66; *Santosky*, *supra*. A commenter cited to an Iowa Supreme Court decision stating that ICWA does not curtail a parent's right to choose the family she feels is best suited to raise her child. *In re the interest of N.N. E.*, 752 N.W.2d 1, 9 (Iowa 2008).

Response: While the placement preferences apply to voluntary placements, the final rule allows birth parents to choose families outside the preferences if they attest that they have reviewed the placement options that comply with the order of preference. *See* FR § 23.132(c)(1). This balances the interest of the parent with the other interests protected by ICWA.

Comment: One commenter raised that, in step-parent adoptions, an Indian family should not come before an Indian mother who wants her husband to adopt her Indian child.

Response: Adoptive placement with a step-parent would meet the placement preferences of the Act, because the first placement preference is a member of the child's extended family and

step-parents are included in the definition of "extended family member." *See* 25 U.S.C. 1903(2); 1915(a); FR §§ 23.2, 23.130(a)(1).

Comment: A few commenters opposed requiring a diligent search for placements in a voluntary adoption context because it conflicts with the parent's freedom to choose who will raise their children. One commenter stated that, by the time a parent goes to an adoption agency, the parent has already explored potentially placing within the family or community and has ruled it out.

Response: The final rule does not include the provision that the commenters identified.

Comment: One commenter stated that applying the placement preferences to voluntary adoptions will result in Indian children having a more difficult time being adopted if there are no available families within the placement preferences.

Response: The placement preferences for adoptions cover a wide range of individuals, including extended family, other citizens of the Indian child's Tribe, and other Tribal citizen families. Nevertheless, good cause may be found to deviate from the placement preferences based on the parent's request for placement with another family or lack of available placements that meet the preferences, among other reasons. *See* FR § 23.131.

4. Applicability of Other ICWA Provisions to Voluntary Proceedings

Comment: Several commenters stated there is no Tribal right to intervene in voluntary proceedings because § 1911(c) provides the right only in State court proceeding for the foster-care placement of, or termination of parental rights to, Indian child. Other commenters stated that there is a compelling governmental interest of Tribes that supports intervention of right, to protect its sovereign interest in Tribal children, and the welfare of Indian children is the same whether the proceeding is voluntary or involuntary.

Response: The commenters are correct that § 1911(c) refers to termination of parental rights" but not "adoptive placement; however, nothing in the Act restricts the phrase "termination of parental rights" to involuntary proceedings. By its plain language, the statute permits Tribal intervention in a voluntary termination-of-parental-rights proceeding.

Comment: One commenter stated that active efforts are required in voluntary proceedings, and another stated they are not.

Response: The statutory provision requiring active efforts appears in the section of the Act that primarily addresses involuntary proceedings. *See* 25 U.S.C. 1912(d). The regulation therefore does not require a showing of active efforts to prevent the breakup of the Indian family in voluntary proceedings.

Comment: One commenter requested clarification as to whether the rule is saying the right in § 1912(b) to appointment of counsel in involuntary proceedings is also available in voluntary proceedings (because PR § 23.111(c)(4)(iv) and (v) and PR § 23.111(f) require the notice to include statements regarding the right to counsel).

Response: The statutory provision requiring the right to court-appointed counsel appears in the section of the Act that primarily addresses involuntary proceedings. *See* 25 U.S.C. 1912(b).

5. Applicability to Placements Where Return is "Upon Demand"

A few commenters requested deletion or clarification of PR § 23.103(f) because of the risk that it will improperly exclude certain adoptive placements from ICWA. One commenter suggested as an alternative "voluntary placements made without involvement of an agency or State court where the parent can regain custody of the child upon demand are not covered by ICWA." One commenter stated that if the State is involved, there is always the threat of

involuntary removal if the parent does not "agree" to the placement, and that these placements should be subject to ICWA. This commenter suggested adding that every placement in which the State has a say should be treated as an ICWA placement.

Response: As mentioned above, the final rule defines "upon demand" to mean verbal demand without any required formalities or contingencies and adds to the definition of "voluntary placement" that the placement be without a threat of removal by a State agency. *See* FR § 23.2.

6. Consent in Voluntary Proceedings

Comment: A commenter suggested beginning PR § 23.124(a) with "any voluntary consent to" rather than "a voluntary termination."

Response: The final rule makes this editorial change for consistency. *See* FR § 23.125(a).

Comment: A commenter noted that PR § 23.124 is important because agencies and attorneys have used voluntary consent to essentially "trick" parents and extended family into permanently surrendering their custodial rights. The commenter notes that safeguards, including that the consent be recorded before a judge, are essential to protecting rights and eliminating the possibility of dispute over intent, preventing litigation, and avoiding emotional trauma. Another commenter stated that the rule should instead allow for consent to be entered before a notary public to save time and money.

Response: The regulation's requirement that consent be recorded before a judge repeats the statutory requirement. *See* 25 U.S.C. 1913(a), FR § 23.125.

Comment: One commenter suggested clarifying that the court of competent jurisdiction may not be the same court where the child-custody proceeding takes place.

Response: Neither the statute nor the regulations limit the location of the court of competent jurisdiction.

Comment: A commenter suggested the "timing limitations" and "point at which such consent is irrevocable" include cross-references to distinguish consent to foster-care placements (to which no time limitations apply) in PR § 23.126 and adoptions (to which there are time limitations—may be withdrawn at any time prior to the entry of the final decree of termination or adoption) in PR § 23.127.

Response: The final rule clarifies the applicable timeframes in FR §§ 23.127, 23.128.

Comment: A few commenters suggested adding a requirement that the court explain on the record the consequences of consent, right to withdraw consent, and procedure for withdrawing consent, and at what point the right to withdraw ends.

Response: FR § 23.125(b) & (c) requires this explanation on the record.

Comment: A commenter requested clarification that the right to withdraw consent cannot be waived.

Response: The right to withdraw consent is a statutory right. Congress did not include a procedure for waiving the right.

Comment: Several commenters stated it would be unclear what consent procedures to follow in a voluntary proceeding if a child is treated as an Indian child, and then the Tribe later determines the child is not eligible for membership. Under those circumstances, the court would have told the parent they have the right to withdraw consent at any time prior to termination of parental rights; whereas, the right to revoke consent under State law may be more limited.

Response: In the situation described by the commenter, if the State court determines that the child is not an Indian child, the State court would need to determine whether to allow the withdrawal under State law.

Comment: A commenter suggested adding that the written consent must be by both the mother and father. Another commenter suggested adding that a known biological parent must have the opportunity to consent or object where the other parent has voluntarily consented.

Response: An individual parent's consent is valid only as to himself or herself.

Comment: A commenter recommended revising "need not be made in open court" to clarify that the consent still must be recorded before a judge, but need not be recorded in a session open to the public.

Response: FR § 23.125(d) clarifies that the consent must be recorded before a judge, though it need not be recorded in a session open to the public.

Comment: A commenter stated that the provision that "a consent given prior to or within 10 days after the birth is not valid" infringes on a parent's right to arrange for adoption.

Response: The final rule retains this provision because it is statutory. *See* 25 U.S.C. 1913(a).

Comment: A commenter suggested allowing incarcerated parents that cannot leave prison to attend court for this purpose to consent without attending court to avoid undue delays in permanency for children.

Response: The final rule encourages the use of alternative methods of participation such as participation by telephone, videoconferencing or other methods. *See* FR § 23.133.

7. Consent Document Contents

Comment: Commenters suggested requiring additional information in the consent document (PR § 23.125), such as the name and address of the non-custodial parent, parents' Tribal enrollment numbers, the name and address of prospective adoptive or preadoptive parents, and details regarding the right and timeframes for withdrawing consent.

Other commenters stated that the extent of information proposed is inappropriate, and suggested deleting:

- The address of the consenting parent because the information would already be in other files and could cause confidentiality concerns; and
- Identification and addresses of foster parents because of confidentiality.

Response: The final rule establishes that the written consent must include the name and birthdate of the Indian child, the name of the Indian child's Tribe, identifying Tribal enrollment number, if known, and the name of the consenting parent. It must also clearly set out any conditions to the consent. *See* FR § 23.126. A State may choose to include additional information.

Comment: A few commenters suggested adding a provision stating that any consent not executed as described is not binding.

Response: The final rule requires that any conditions be set out in the written consent, because § 1913(a) requires the consent to be in writing in order to be valid. *See* FR § 23.126(a).

8. Withdrawal of Consent

Comment: A few commenters suggested adding when consent to a termination of parental rights or adoption or consent to a foster-care placement may be withdrawn.

Response: The final rule addresses the deadline for withdrawing consent to the termination of parental rights and adoption, and adds that consent to a foster-care placement may be withdrawn "at any time." *See* FR § 23.127, § 23.128.

Comment: A commenter requested clarification that the parent withdrawing the consent does not need to be the person who files the withdrawal in court because many parents may not have legal representation and may lack the sophistication to file papers with the court and the parent may not be informed as to which court the consent was filed in. This commenter stated that the parent should be allowed to file the withdrawal with current custodians, their attorney, or the agency that took the consent, or as a last resort with BIA.

Response: The final rule sets as a default standard that the parent or Indian custodian must file a written withdrawal of consent with the court, or testify before the court, but that State law may provide additional methods for withdrawing consent. *See* FR § 23.127, § 23.128. This is not intended to be an overly formalistic requirement. Parents involved in pending foster-care placement or termination-of-parental-rights proceedings can be reasonably expected to know that there are court proceedings concerning their child, and the final rule balances the need for a clear indication that the parent wants to withdraw consent with the parent's interest in easily withdrawing consent.

Comment: A few commenters opposed the requirements for withdrawal of consent to be filed. A commenter stated that ICWA's intent was to make it as easy as possible to withdraw consent in furtherance of having Indian children raised by their families, so they should be able to do so in any way where the intent to withdraw is clear. Another commenter stated that State law may permit revocation without filing an instrument in court, and that the requirement for filing may delay return of the child.

Response: The final rule continues to require a filing of the withdrawal with the court, but adds testimony before the court as an option to fulfill this requirement, because the formality roughly equal to that required for the original consent is appropriate and it is important that the court and other parties know when the parent seeks to withdraw consent. The final rule sets this standard as a default, but States may have additional methods for withdrawing consent that are more protective of a parent's rights that would then apply.

Comment: One commenter stated that the return of the child in PR § 23.126(b) should not be immediate but should be "as soon as practicable" as stated in PR § 23.127(b), because there are circumstances where immediate return is not practical. Another commenter noted that § 1913 of the Act does not specify when the child must be returned.

Response: The final rule accepts the suggested edit for return of a child "as soon as practicable" if a parent withdraws consent to foster-care placement, but the Department notes that in most cases the return should be nearly immediate because foster-care placement is necessarily intended to be temporary. The final rule retains the requirement for return of the child "as soon as practicable" when the parent withdraws consent to a termination or adoption. *See* FR §§ 23.127, 23.128.

Comment: A few commenters opposed the provision stating that consent to termination of parental rights or adoption may be withdrawn any time prior to the entry of the final decree of termination or final decree of adoption, "whichever is later;" rather than the statutory language, "as the case may be." These commenters state that courts have uniformly interpreted § 1913(c) to cut off the right to withdraw consent upon entry of the final order terminating parental rights, even if an adoption decree has not been entered.

Other commenters supported the language "whichever is later." One noted that a child has no legal parents after termination but before the final decree of adoption, so if the purpose of adoption is to provide the child with parents, then the biological parents or Indian custodian should be allowed to resume parental responsibilities up to the point of a finalized adoption. Another stated that this phrase addresses confusion caused by the statutory phrase "as the case may be" to construe the original intent of the provision that would establish a nationwide standard that does not limit a parent's right to end a possible adoption and secure return of the child.

Response: As a commenter noted, the statute uses the phrase "as the case may be" rather than specifying whichever is later. *See* 25 U.S.C. 1913(c). To better address the meaning of "as the case may be," the final rule treats each proceeding separately, so that a parent may withdraw consent to a termination of parental rights any time before the final decree for that termination of parental rights is entered, and a parent may withdraw consent to an adoption any time before the final decree of adoption is entered.

Comment: A commenter stated that PR § 23.127(b) places the burden on the court to notify the placement of the withdrawal of consent, but in some cases the court may not know the contact information for the placement (e.g., where consent was filed in a different court than the one with current jurisdiction and placement was arranged by private parties).

Response: The final rule (like the proposed rule) requires the court to contact the party by or through whom any preadoptive or adoptive placement has been arranged. In most cases this will be the agency, whether public or private. The agency is expected to have the contact information for the placement.

Comment: A commenter suggested using the word "court" instead of "clerk of the court" which may be too specific.

Response: The final rule uses "court" instead of "clerk of the court." *See* FR § 23.128(d).

Comment: A commenter suggested adding a requirement that the court notify the consenting parent or Indian custodian of the entry of a final decree of adoption within 15 days so that they know there is no longer a right to withdraw the consent. This commenter also suggested requiring the court to notify the consenting parent every 120 days following the consent, to keep them informed as to the progress of adoptive placement in case an adoption never occurs.

Response: The final rule does not incorporate these requirements, as the statute does not require such notice.

9. Confidentiality and Anonymity in Voluntary Proceedings

Comment: Many commenters opposed the proposed rule on the basis that it would violate the parents' right to privacy, confidentiality, and anonymity in choosing a placement. Among the problematic provisions these commenters pointed to were:

- PR § 23.123(a) requiring an inquiry be made into whether the child is an Indian child in voluntary proceedings, because this will result in the parents losing their privacy and confidentiality, particularly in small Tribal communities; and
- The requirement to inform members of the Indian child's extended family, in order to identify a placement.

These commenters noted that the 1979 guidelines stated that the Act gives confidentiality a "much higher priority" in voluntary proceedings, and that the Act directs State courts to respect parental requests for confidentiality in voluntary proceedings.

Response: The final rule requires, for the reasons already stated, that the State court determine whether the child is an "Indian child" which may, in some instances, require contacting the Tribe. The final rule does not mandate contacting extended family members to identify potential placements. The final rule also includes several protections to ensure confidentiality. Among these are the following:

- With regard to inquiry and verification, the final rule provides that, where a consenting parent requests anonymity, both the State court and Tribe must keep relevant documents and information confidential. *See* FR § 23.107(d).
- With regard to a parent or Indian custodian's consent to a placement or termination of parental rights, the final rule provides that, where confidentiality is requested or indicated, the parent or Indian custodian does not need to execute the consent in a session of court open to the public, as long as he or she executes the consent before a judge. *See* FR § 23.125(d).

M. Dispositions

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible. Section 1915, which lays out the placement preferences, constitutes the "most important substantive requirement [that ICWA] imposed on state courts." *Holyfield*, 490 U.S. at 36. It establishes a series of preferred placements for foster care, preadoptive, and adoptive placements. It also allows the Indian child's Tribe to establish a different order of preference. The party urging that the ICWA preferences not be followed bears the burden of proving by clear and convincing evidence the existence of "good cause" to deviate from such a placement. 25 U.S.C. 1915(a), (b); FR § 23.132(b).

Congress established preferred placements in ICWA that it believed would help protect the needs and long-term welfare of Indian children and families, while providing the flexibility to ensure that the particular circumstances faced by individual Indian children can be addressed by courts. In §§ 23.129-32, the final rules provide guidance to States to ensure nationwide uniformity of the application of these placement preferences as well as the standards for finding good cause to deviate from them.

The preferences in ICWA and the final rule codify the best practice in child welfare of favoring extended family placements, including placement within a child's broader kinship community. If a child is removed from her parents, the first choice in child-welfare practice for an alternative placement—for all children, not just Indian children—is the child's extended family. *See* National Council of Juvenile and Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 10-11 (2000) ("An appropriate relative who is willing to provide care is almost always a preferable caretaker to a non-relative."); Child Welfare League of America, Standard of Excellence for Adoption Services 1.10 (2000) (2000) ("Adoption Standards") ("The first option considered for children whose parents cannot care for them should be placement with extended family members..."); Child Welfare League of America, Standard of Excellence for Kinship Care Services 1.4 (2000) ("Kinship Care Standards") ("Kinship care … should be the first option considered…"); Elaine Farmer & Sue Moyers, Kinship Care: Fostering Effective Family and Friends Placements (2008).

Placing children with their extended family benefits children. *See* Adoption Standards 8.24, 4.23 (kinship care "maximizes a child's connection to his or her family"); Tiffany Conway & Rutledge Hutson, *Is Kinship Care Good for Kids?*, Center for Law and Social Policy 2 (Mar. 3, 2007) ("[T]he research tells us that many children who cannot live with their parents benefit

from living with grandparents and other family members.") (emphasis omitted). This is true for children who are placed in foster care as well as those who are adopted. *See* Kinship Care Standards, at 5 (noting beneficial outcomes of kinship care for foster care including children being less likely to experience multiple placements and more likely to be successfully reunified with their parents); Adoption Standards § 4.23; Marc A. Winokur, et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOC'Y: J. CONTEMP. SOC. SCIENCES 338, 344-45 (2008) (reporting better outcomes for children in kinship care on several metrics). Congress recognized that this general child-welfare preference for placement with family is even more important for Indian families, as one of the driving concerns leading to the passage of ICWA "was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society." *Holyfield*, 490 U.S. at 35 n.4.

Even if biological relatives are not available for placements, there are benefits to children from placements within their community, which Congress recognized by establishing placement preferences for Tribal members. 25 U.S.C. 1915(a), (b). Again, this is not just a principle of child-welfare practice for Indian children, but for all children. *See* Kinship Care Standards §§ 1.1, 2.8. But it has special force and effect for Indian children, since, as Congress recognized, there are harms to individual children and parents caused by disconnection with their Tribal communities and culture, and also harms to Tribes caused by the loss of their children.

Recognizing the benefits of placements with family and within communities, Congress has repeated its emphasis on such placements in subsequent statutes in the years since it passed ICWA. For example, in order to obtain Federal matching funds, a State must consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards, and

must exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. 42 U.S.C. 671(a)(19), (29); see also *Miller v. Youakim*, 440 U.S. 125, 142 n.21 (1979) (noting "Congress' determination that homes of parents and relatives provide the most suitable environment for children"). Congress has also required states receiving Federal funds to prioritize placement in close proximity to the parents' home, recognizing the importance of placement within the community. 42 U.S.C. 675(5)(A).

Congress, through ICWA's placement preferences, and the Department, through this regulation, continue to treat the physical, mental, and emotional needs of the Indian child as paramount. *See, e.g.,* FR § 23.132(c), (d). These physical, mental, and emotional needs include retaining contact, where possible, with the Indian child's extended family, community, and Tribe. If there are circumstances in which an individual child's extraordinary physical, mental, and emotional needs could not be met through a preferred placement, then good cause may exist to deviate from those preferences. *See* FR § 23.132(c)(4).

The Department received many comments regarding what may constitute "good cause" to deviate from the placement preferences and whether the final rule should set out such factors. By providing clear guidance on what constitutes "good cause" to deviate from the placement preferences, the final rule gives effect to the fact that Congress intended good cause to be a limited exception, rather than a broad category that could swallow the rule. The Department also recognizes that the question of what constitutes good cause is a frequently litigated area of ICWA, and this litigation can result in harmful delays in achieving permanency for children. For these reasons, the Department has determined that it is important to provide some parameters on what may be considered "good cause" in order to give effect to ICWA's placement preferences.

The final rule, therefore, lays out five factors upon which courts may base a determination of good cause to deviate from the placement preferences. These factors are discussed in more detail below in the response to comments, but include the request of the parents, the request of the child, sibling attachment, the extraordinary physical, mental, or emotional needs of the child, and the unavailability of a suitable preferred placement. FR § 23.132(c). It also makes clear that a court may not depart from the preferences based on the socioeconomic status of any placement relative to another placement or based on the ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA. FR § 23.132(d), (e).

The final rule also recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. Thus, the final rule says that good cause "should" be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason. While the rule provides this flexibility, courts should only avail themselves of it in extraordinary circumstances, as Congress intended the good cause exception to be narrow and limited in scope.

As requested by commenters, the rules governing placement preferences recognize the importance of maintaining biological sibling connections. The placement preferences allow biological siblings to remain together, even if only one is an "Indian child" under the Act, because FR § 23.131(a) provides that the child must be placed in the least restrictive setting that most approximates a family, allows his or her special needs to be met, and is in reasonable proximity to his or her home, extended family, and/or siblings. The sibling placement preference

does not mean ICWA applies to a sibling who is not an "Indian child" but rather makes clear that good cause can appropriately be found to depart from ICWA's placement preferences where doing so allows the "Indian child" to remain with his or her sibling. Because keeping biological siblings together contributes toward a setting that approximates a family, the final rule explicitly adds "sibling attachment" as a consideration in choosing a setting that most approximates a family. *See* FR § 23.131(a)(1). If for some reason it is not possible to place the siblings together, then FR § 23.131(a)(3) mandates that the Indian child should be placed, if possible, in a setting that is within a reasonable proximity to the sibling. In addition, if the sibling is age 18 or older, that sibling would qualify as a preferred placement, as extended family.

A number of commenters praised or questioned the provisions at PR § 23.128(b) requiring, in certain circumstances, a search to identify placement options that would satisfy the placement preferences. The final rule has been modified to include a requirement that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine that a diligent search was conducted to find placements meeting the preference criteria. *See* FR § 23.132(c)(5). This provision is required because the Department understands ICWA to require proactive efforts to comply with the placement preferences and requires more than a simple back-end ranking of potential placements. It is also consistent with the Federal policy for all children—not just Indian children—that States are to exercise "due diligence" to identify, locate, and notify relatives when children enter the foster care system. 42 U.S.C. 671(a)(19), (29).

ICWA requires that there be efforts to identify and assist preferred placements. Section 1915(a) directs that, in any adoptive placement of an Indian child under State law, a preference "shall" be given to the Indian child's family and Tribe. 25 U.S.C. 1915(a) (1)-(2). This language

creates an obligation on State agencies and courts to implement the policy outlined in the statute. "Giv[ing]" a "preference" means more than mere prioritization—it connotes the active bestowal of advantages on some over others. *See* BLACK'S LAW DICTIONARY 1369 (10th ed. 2014) (defining "preference" as the "quality, state, or condition of treating some persons or things more advantageously than others" and the "favoring of one person or thing over another"). Thus, § 1915(a) requires affirmative steps to give preferred placements certain advantages and a full opportunity to participate in the child-custody determination.

This conclusion is supported by other provisions of § 1915, which work in concert with § 1915(a) to require that State agencies and courts make efforts to identify and assist extended family and Tribal members with preferred placements. Section 1915(e) requires that, for each placement, the State must maintain records evidencing the *efforts to comply* with the order of preference specified in § 1915. 25 U.S.C. 1915(e). To allow oversight of such efforts, Congress further required that those records be made available at any time upon the request of the Secretary or the Indian child's tribe. *Id.* Thus, reading Sections 1915(a) and 1915(e) together, it is clear that Congress demanded documentable "efforts to comply" with the ICWA placement preferences.

Courts have recognized that State efforts to identify and assist preferred placements are critical to the success of the statutory placement preferences. *See Native Village of Tununak v. State, Dep't of Health and Soc. Servs. (Tununak II)*, 334 P.3d 165, 177-78 (Alaska 2014) (noting that before a court in which an adoption proceeding is pending can even "entertain[] argument that there is good cause to deviate from § 1915(a)'s preferred placements, it must searchingly inquire about the existence of, and [the State's] efforts to comply with achieving, suitable § 1915(a) preferred placements"); *In re T.S.W.*, 276 P.3d 133, 142-44 (Kan. 2012) (rejecting a

lower court's determination that there was good cause to deviate from the placement preferences based, in part, on the adoption agency's failure to make adequate efforts to identify potential preferred placements); *In re D.W.*, 795 N.W.2d 39, 44-45 (S.D. 2011) (carefully examining the sufficiency of the steps that the State took to find a suitable preferred placement); *In re Jullian B.*, 82 Cal. App. 4th 1337, 1347 (Cal. Ct. App. 2000) (emphasizing that ICWA requires the State to "search diligently for a placement which falls within the preferences of the act"); *Pit River Tribe v. Superior Court*, No. C067900, 2011 WL 4062512, at *10, *12 (Cal. Ct. App. Sept. 14, 2011).

Finally, the final rule provides that a court may not consider, as the sole basis for departing from the preferences, ordinary bonding or attachment that flows from time spent in a non-preferred placement that was made in violation of ICWA. In response to commenters' concerns, the final rule adjusts the proposed provision stating that "ordinary bonding" is not within the scope of extraordinary physical, mental, or emotional needs. PR § 23.131(c)(3). The proposed provision may have inappropriately limited court discretion in certain limited circumstances.

1. When Placement Preferences Apply

Comment: Several commenters supported proposed PR § 23.128, emphasizing the need to follow the Act's placement preferences, and noted that it addresses one of the biggest problems in the Act's implementation—the failure to place Indian children in the homes of extended family and Tribal members. One commenter pointed to the repeated failure in one State to investigate preferred placements and the practice of relying on bonding with non-preferred placements as good cause to depart from the placement preferences. Another commenter asserted that States are not pursuing placement preferences even when the Tribe identifies a family that

meets the requirements. Several commenters provided reasons for why the placement preferences are so important, including to minimize trauma by placing the child somewhere within their realm of comfort and to promote the best interests of the child by keeping the child with her family or within her Tribal community and culture.

Several opposed PR § 23.128, saying it gives higher priority to the Tribe than to the family, and prevents the court from weighing relative interests. These commenters stated that placement preferences should be secondary to the individual child's needs and welfare.

Response: The Act requires that States apply a preference for the listed placement categories. 25 U.S.C. 1915. As discussed above, Congress established preferred placements in ICWA that it believed would help protect Indian children's needs and welfare, while providing the flexibility to ensure that particular circumstances faced by individual Indian children can be addressed by courts. In enacting ICWA, Congress also recognized that State and private agencies and State courts sometimes apply their own biases in assessing what placement best meets the individual Indian child's needs and long-term welfare. The final rule reflects the statutory mandate.

Comment: A few Tribal commenters suggested the rule allow for such different orders as established by Tribal law or Tribal-State agreements.

Response: FR § 23.129(a), FR § 23.130(b), and FR § 23.131(c) reflect the statutory requirement that a Tribe may establish a different order of preference by resolution. *See* 25 U.S.C. 1915(c). The Department recognizes that an order of preference established as part of a Tribal-State agreement would constitute an order of preference established by "resolution," 25 U.S.C. 1915(c), particularly as the statute specifically authorizes Tribal-State agreements respecting care and custody of Indian children. 25 U.S.C. 1919.

Comment: A commenter stated that PR § 23.128(a) omits language from § 1915(c) of the Act that the Tribe's order of preference should be followed only "so long as the placement is the least restrictive setting appropriate to the particular needs of the child." According to this commenter, that omitted language is what makes clear that the best interest of the child must be considered and provides a basis for not following the placement preference order.

Response: FR § 23.131 adds the statutory language providing that the placement must be the least restrictive setting that most approximates a family, taking into consideration sibling attachment, allows the Indian child's special needs, if any, to be met, and is in reasonable proximity to his or her home, extended family, and/or siblings. The Department disagrees, however, that this language provides a basis for not following the preference order in the ordinary case.

Comment: A commenter opposed the language in PR § 23.128(a) stating that the placement preferences always apply without a cross-reference to the good cause provision. Likewise, a few commenters stated that PR § 23.129 and § 23.130 should both use the phrase "in the absence of good cause to the contrary" as qualifying language because Congress intended State courts to consider the unique circumstances affecting individual children and the statute includes the language "in the absence of good cause to the contrary" in each paragraph (§1915(a) and (b)).

Response: The provision establishing that good cause must exist to depart from the placement preferences is located at FR § 23.129(c). Specific provisions regarding good cause are set out in FR § 23.132; it is not necessary to repeat "in the absence of good cause to the contrary" in FR §§ 23.130 or 23.131.

Comment: Several commenters supported requiring a diligent search for placements within ICWA's placement preferences (extended family, Tribal families, and other Indian families) and noted this is a best practice that is in the child's best interest. A commenter stated that the requirement for a diligent search is critically important because ICWA's requirements have been ignored and almost half the children continue to be placed in non-preferred placements. A few commenters suggested further emphasizing the need for States to identify preferred placements by working with Tribes to proactively recruit preferred placement homes.

A few commenters opposed requiring a diligent search, saying it is not required by ICWA and that Congress intended to rely on State family law to establish requirements for placement option searches.

Response: As discussed above, a diligent search is necessarily implied by the Act to comply with the placement preferences. The regulations make this requirement explicit in situations where a party seeks good cause to deviate from the placement preferences based on unavailability. *See* FR § 23.132(c)(5). Furthermore, State agencies generally search for a child's extended family as a matter of practice.

Comment: A commenter stated that the diligent search for foster placements including homes licensed, approved, or specified by the child's Tribe conflicts with the Act's requirement that the child be placed within a reasonable proximity to his or her home (as well as other requirements associated with Federal funding).

Response: While the specific portion of PR § 23.128(b) that the commenter is addressing is not included in the final rule, FR § 23.131(a) reflects the Act's requirements for the child to be placed in the least restrictive setting that most approximates a family and in which the child's

special needs, if any, may be met, and within reasonable proximity to the child's home. *See* 25 U.S.C. 1915(b), (c).

Comment: A commenter asked whether the showing as to the diligent search for placements has to be made at every hearing, or whether the rule is creating a requirement that a specific placement proceeding happen in each ICWA case that does not comply with the first placement preference. This State commenter also expressed concern regarding State resources this would require.

Response: The rule does not require a showing at every hearing that a diligent search for placements has been made or that a specific hearing be held to show why the first placement preference was not attainable. The rule requires that, if the agency relies on unavailability of placement preferences as good cause for deviating from the placement preferences, it must be able to demonstrate to the court on the record that it conducted a diligent search. *See* FR § 23.132(c)(5). This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate.

Comment: Several commenters requested that the rule address the Alaska Supreme Court's limitation in *Native Village of Tununak v. Alaska* to define what a preferred placement family needs to do to demonstrate a willingness to adopt a particular child (e.g., the individual, agency, or Tribe informs the court orally during a proceeding or in writing of willingness to adopt). Several other commenters stated that the rule ignores the Supreme Court's ruling that the preferences are inapplicable where no eligible placement has formally sought to adopt the child.

Response: As discussed above, ICWA requires that there be efforts to identify and assist preferred placements. As a recommended practice, the State agency should provide the preferred placements with at least enough information about the proceeding so they can avail themselves

of the preference. Alaska itself has taken corrective action to address the ruling in *Tununak* by modifying its standards to facilitate more means by which to demonstrate willingness to adopt a particular child. We encourage other States to follow Alaska's lead in this regard.

Comment: A few commenters stated that it is impractical to notify each of the homes listed in PR § 23.128(b)(4) (institutions for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs). A commenter also pointed out that, practically, there are no accessible lists of every Indian foster home in the State or whether they would want such notification which could amount to hundreds of letters each year.

Response: The specific portion of the provision of proposed rule § 23.128(b) that commenters are addressing is not included in the final rule. As discussed above, however, the rule does include a requirement that, in order to determine that there is good cause to deviate from the placement preferences based on unavailability of a suitable placement, the court must determine on the record that a diligent search was conducted to find suitable placements meeting the preference criteria. *See* FR § 23.132(c)(5). A diligent search will almost always require some contact with those preferred placements that also meet the requirements for a least restrictive setting within a reasonable proximity, taking into account the child's special needs. It may also involve contacting particular institutions for children approved or operated by Indian Tribes if other preferred placements are not available.

Comment: A few commenters had suggested edits to PR § 23.128(b). For example, a State commenter requested clarifications in PR § 23.128(b) as to "placement proceeding" and "explanation of the actions that must be taken to propose an alternative placement and to whom those are provided in the proceedings."

Response: The final rule deletes this provision.

Comment: A commenter suggested changing the last preference to include Indian foster homes "authorized" by the Tribe rather than "licensed" by the Tribe.

Response: The rule includes "licensed" because that is the term the Act uses. *See* 25 U.S.C. 1915(b).

Comment: A commenter requested clarification of whether the agency must show why the higher preferences cannot be complied with instead of a lower preference.

Response: The final rule clarifies what the court will examine in determining whether the placement preferences were met or good cause exists to deviate from the placement preferences. *See* FR § 23.132. The agency must document its search for placement preferences and an explanation as to why each higher priority placement preference could not be met. *See* § 1915(e) (requiring that the State maintain documentation "evidencing the efforts to comply with the order of preference specified in this section"); FR § 23.141.

Comment: One commenter stated that the mandate that placement must always follow the placement preferences is not practical because there are 17 States with no federally recognized Tribes, meaning the child would face a move to a location that would make reunification more difficult.

Response: The fact that a no federally recognized Tribe is located within a State does not mean that there are no family members or members of Tribes residing or domiciled in that State.

Comment: Some commenters requested that the placement preferences allow siblings to remain together even if only one child is an "Indian child" as defined by ICWA. One commenter noted that one State regularly finds that a placement with a minor sibling qualifies as a placement with extended family for purposes of the placement preferences.

Response: As discussed above, the rules governing placement preferences recognize and address the importance of maintaining biological sibling connections.

Comment: One commenter stated that the provision at PR § 23.128(c) stating that the request for anonymity does not relieve the obligation to comply with placement preferences is extremely important because many attorneys in voluntary proceedings advise their clients to request anonymity to avoid the placement preferences.

Response: The final rule includes a provision, discussed above, requiring the court to give weight to the request for anonymity in applying the preferences. *See* FR § 23.129(b).

Comment: A few commenters suggested the rule clarify the ability of State-court judges to issue placement orders under ICWA. These commenters stated that such a provision is necessary because some State codes prohibit a State judge from ordering placement, instead leaving the responsibility to the State social workers.

Response: While it may be the practice in some jurisdictions for judges to defer to State agencies, the statute contemplates court review of placements of Indian children. It requires, for example, court review of whether active efforts were made (§ 1912(d)) and an "order" for foster-care placement (§ 1912(e)) and termination of parental rights (§ 1912(f)). Further, the statute establishes a standard of evidence for foster-care-placement orders and termination-of-parental-rights orders (§ 1912(e)-(f)), necessarily requiring court involvement.

Comment: A few commenters suggested adding a cross-reference in PR § 23.128(d) to the section delineating the good-cause criteria.

Response: The final rule adds the requested clarification. *See* FR § 23.129(c).

Comment: One commenter requested additional clarification on the requirements in PR § 23.128(e) for maintenance of records.

Response: The final rule moves the requirement regarding maintenance of records from PR § 23.128(e) to FR § 23.141. *See* comments on PR § 23.137, below.

2. What Placement Preferences Apply, Generally

Comment: Several commenters expressed their strong support of the placement preferences as assuring that the child's best interests are met by giving the child the opportunity to be placed with relatives. One commenter noted that traditional Indian spirituality, culture, and history cannot be fully taught by a non-Indian family. Commenters stated that studies reflect that placement of children within the ICWA preferences are more stable by half than placements that do not fall within ICWA's preferences.

A few commenters opposed the placement preferences. One stated that Federal law already seeks to place children within the same family and community. Another stated that the preferences are not a mandate, and that there are not enough Indian foster homes so in some cases children have to be placed in non-Indian homes.

One commenter stated that the rule should make the placement preferences discretionary because it may not always be possible to adhere to the placement preferences, and the rule must allow for flexibility to place a child where his or her physical and emotional needs are best met.

Response: As discussed above, Congress established preferred placements in ICWA that it believed would help protect Indian children's needs and welfare. The statute provides the flexibility to ensure that special circumstances faced by individual Indian children can be addressed by courts. The final rule reflects the child's best interests and the order of the preferred placements. The criteria applicable to foster-care placements allow for placements in which the child's special needs, if any, may be met.

Comment: A few commenters stated that the guidelines contradict the Multiethnic Placement Act (MEPA) to prevent discrimination based on race, color and/or national origin when making placements, and that some Indian children do not have an apparent existing connection to their traditional culture and are thus "mainstream."

Response: These comments are based on the misunderstanding that ICWA is a race-based statute. Congress established certain placement preferences based on, and in furtherance of, the political affiliation of Indian children and their parents with Tribes, and the government-to-government relationship between the United States and Tribes. Recognizing that the applicability of ICWA is based on political affiliation rather than race, Congress made clear that MEPA should not be construed to impact the application of ICWA. 42 U.S.C. 674(d)(4), 1996b(3) (each stating this subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978).

Comment: One commenter suggested adding language to clarify that the preferences are in descending order of preference. A commenter stated that States should not be allowed to skip steps in the preferences.

Response: FR §§ 23.130(a) and 23.131(b) state that the preferences are in descending order, reflecting that each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Comment: Several commenters suggested adding a provision to allow the court to consider the Tribe's recommended placement for an Indian child, to take into consideration Tribal custom, law, and practice when determining the welfare of Indian children, as authorized by § 1915(c), which states that the Tribe may establish a different order of preference.

Response: Congress established a method for the Tribe to express its preferences in § 1915(c). FR §§ 23.129(a), 23.130(b), and 23.131(c) are included in the final rule in recognition of that statutory requirement. State courts may also wish to consider a Tribe's recommended placement for a particular child.

Comment: A few commenters stated that the placement preferences should better protect the rights of biological fathers. One suggested including biological fathers in the list of placement preferences.

Response: The final rule's placement preferences reflect the statute. If the biological father meets the criteria for the placement preferences (for example, as a member of the Indian child's Tribe), he may avail himself of the placement preferences. In addition, the Act establishes that unwed fathers who have not acknowledged or established paternity are not considered "parents" under the Act; however, by acknowledging or establishing paternity, the father may become a "parent" under the Act, and avail himself of ICWA's protections.

Comment: A few commenters stated that the placement preferences should extend beyond the nuclear family to include extended family (aunts, uncles, grandparents) because ICWA was designed to keep Indians rooted to their Tribes and culture if the nuclear family breaks down.

Response: Members of the child's extended family are the first-listed preferred placement. *See* 25 U.S.C. 1915(a), (b); FR § 23.130(a)(1); § 23.131(b)(1).

3. Placement Preferences in Adoptive Settings

Comment: One commenter suggested adding licensed adoptive homes to the list of placement preferences in PR § 23.129 and PR § 23.130.

Response: The rule does not specify licensed adoptive homes in the list of placement preferences because the statute does not specify these homes, and this change would not comport with the intent of Congress to place Indian children, where possible, with extended family or Tribal members.

Comment: A State commenter requested clarification in PR § 23.129(b) of the phrase "where appropriate" and whether the child or parent's preference supersedes the placement preferences. A few commenters stated that the rule should use the word "shall" or "must" to require the court to consider the preference of the Indian child or parent, in accordance with § 1915. A few other commenters supported use of "should" in this provision, stating that otherwise the Indian child's or parent's preference would trump the placement preferences.

Response: The final rule reflects the language of the statute. This language does not require a court to follow a child or parent's preference, but rather requires that it be "considered" "where appropriate."

4. Placement Preferences in Foster or Preadoptive Proceedings

Comment: Several commenters expressed concern that unavailability of preferred placements will result in longer periods of instability for the child or delays in permanency for the child. A few commenters requested that timelines be imposed on finding preferred placements. For example, one commenter stated that once a Tribe is notified, it should have a certain timeframe to provide a permanent home for the child or an exception to ICWA should be made for the well-being of the child, otherwise the rule denies permanency for the child in the name of cultural preservation.

Response: The Department has not identified any authority in the statute for imposing timelines to find a placement; therefore, the rule does not do so. The unavailability of a suitable

preferred placement is one of the bases for good cause to depart from the placement preferences, so long as a diligent search for a preferred placement was conducted. FR § 23.132(c)(5). Thus, so long as a prompt and diligent search is made for a preferred placement, these rules should not delay permanency.

Comment: A commenter suggested that a needs assessment by a qualified expert witness should be required in PR § 23.130(a)(2) where it references a child's needs.

Response: The statute explicitly refers to "special needs" but does not qualify it as requiring the input of a qualified expert witness, as the statute does in other places. Therefore, the rule does not impose this requirement.

5. Good Cause to Depart from Placement Preferences

Comment: A few commenters said the proposed rule requires a hearing on whether good cause exists and opposed the requirement for an agency to wait for a court to act in order to depart from the placement preferences. One commenter stated that this requirement is contrary to ICWA because while ICWA states that the court must determine there is good cause to deny transfer, it does not require the court to determine whether good cause to depart from placement preferences exists. A State commenter asserted that there will be significant workload increases for agencies if there must be an evidentiary hearing even when there is no objection from the Tribe or parents. This commenter also stated that requiring the judge to determine good cause in the absence of the parties' disagreement puts the court in the role of case administrator rather than arbiter.

Response: Where the requirements of 25 U.S.C. 1912(d)-(e) have been met, a court evidentiary hearing may not be required to effect a placement that departs for good cause from the placement preferences, if such a hearing is not required under State law. *See* § 1915(c).

Regardless of the level of court involvement in the placement, however, FR § 23.132(a) requires that the basis for an assertion of good cause must be stated in the record or in writing and the statute requires a record of the placement be maintained. § 1915(e), FR § 23.141.

Where a Tribe or other party objects, however, the final rule establishes the parameters for a court's review of whether there is good cause to deviate from the placement preferences and requires the basis for that determination to be on the record. *See* FR § 23.129(c). While the agency may place a child prior to or without any determination by the court, the agency does so knowing that the court reviews the placement to ensure compliance with the statute.

Comment: A few commenters supported the requirement in PR § 23.128(b) for "clear and convincing evidence" that the placement preferences were met, and in PR § 23.131(b) for "clear and convincing evidence" of good cause to depart from the placement preferences. Some of these commenters point out that the court in *Tununak II* overturned the initial application of only a "preponderance of the evidence" standard. One commenter stated that elevating the standard of proof to "clear and convincing evidence" is an important means of strengthening the statutory preferences, but recommended making it permissive because ICWA intended State courts to retain flexibility. *See* S. Rep. No. 95-597. A few other commenters opposed specifying "clear and convincing evidence" as exceeding the Department's authority.

Response: The final rule states that the party seeking departure from the placement preferences should prove there is good cause to deviate from the preferences by "clear and convincing evidence." FR § 23.132(b). While this burden of proof standard is not articulated in § 1915 of the statute, courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact. *See In re MKT,*

4368 P.3d 771 ¶ 47 (Okla. 2016); *Gila River Indian Cmty. v. Dep't. of Child Safety*, 363 P.3d 148, 152-53 (Ariz. Ct. App. 2015); *In re Alexandria P.* 176 Cal.Rptr.3d 468, 490 (Cal. Ct. App. 2014); *Native Vill. of Tununak v. Alaska*, 303 P.3d 431, 448, 453 (Alaska 2013) *vacated in part on other grounds by* 334 P.3d 165 (Alaska 2014); *People ex rel. S. Dakota Dep't of Soc. Servs.*, 795 N.W.2d 39, 44, ¶ 24 (S.D. 2011); *In re Adoption of Baby Girl B.*, 67 P.3d 359, 374, ¶ 78 (Okla. Civ. App. 2003); *In re Custody of S.E.G.*, 507 N.W.2d 872, 878 (Minn. Ct. App. 1993); *but see Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation*, 238 P.3d 40, 50 n. 17 (Or. Ct. App. 2010) (addressing the issue in a footnote in response to a "passing" argument).

While the final rule advises that the application of the clear and convincing standard "should" be followed, it does not categorically require that outcome. However, the Department finds that the logic and understanding of ICWA reflected in those court decisions is convincing and should be followed. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be. So, while the Department declines to establish a uniform standard of proof on this issue in the final rule, it will continue to evaluate this issue for consideration in any future rulemakings.

a. Support and Opposition for Limitations on Good Cause

Comment: Many commenters supported emphasizing the need to follow the placement preferences and limiting agencies' and courts' ability to deviate from the placement preferences based on subjective and sometimes biased factors. Commenters reasoned:

- One of ICWA's primary purposes is to keep Indian children connected to their families, Tribal communities and culture, and yet, currently more than 50% of Native American children adopted are placed into non-Native homes;
- Defining "good cause" is within DOI's authority under ICWA;
- Defining "good cause" will provide clarity to on-the-ground social workers and others because the phrase "good cause" has been interpreted differently among States;
- The provision explaining that the length of time a child is in a non-compliant placement is irrelevant is consistent with best practices in child welfare;
- Restrictions on good cause are necessary to ensure courts do not disregard ICWA's placement preferences based on a non-Indian assessment of what is "best" for the child, such as through a generalized "best interest" analysis;
- Use of "good cause" to deviate from placement preferences has become so liberal that it has essentially swallowed ICWA's mandate; and
- Without the rule, "good cause" leaves so much discretion to State courts that the Tribe rarely prevails in moving a child to a preferred placement after initial placement elsewhere.

Many other commenters opposed the rule's definition of "good cause." Among the reasons stated for this opposition were:

- The rule's basis for "good cause" is so narrow that it leaves courts with no flexibility, contrary to congressional intent;
- The rule is not a reasonable interpretation and will not receive deference because it predetermines good cause even though the legislative history explicitly states that the term "good cause" was intended to give State courts flexibility;

- The rule excludes "best interest" factors as a basis for good cause even though placements directly implicate a child's best interests;
- The rule could require placement in a home that every party to the proceeding, including the Tribe, believes is contrary to the best interests of the child; and
- The rule violates Indian children's rights to due process by limiting the factors and probative evidence a State court can consider as compared to non-Indian children.

One commenter expressed concern that courts may interpret the word "must" as requiring them to automatically find good cause when any of the listed circumstances exist.

Response: As discussed above, Congress established preferred placements in ICWA that it believed would help protect the long-term health and welfare of Indian children, parents, families, and Tribes. ICWA must be interpreted as providing meaningful limits on the discretion of agencies and courts to remove Indian children from their families and Tribes, since this is the very problem that ICWA was intended to address. Accordingly, the final rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences. These factors accommodate many of the concerns raised by commenters, and include the request of a parent, the child, sibling attachments, the extraordinary physical, mental, or emotional needs of a child, and the unavailability of suitable preferred placements. The final rule retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making this determination.

b. Request of Parents as Good Cause

Comment: A commenter stated their support of PR § 23.131(c)(1), requiring both parents to request the deviation in order for it to qualify as good cause, because it will lessen instances where the rights of the child's mother are deemed more important than those of the father. A few

commenters opposed requiring both parents to request because there are instances in which one parent is unavailable, cannot be found, is mentally disabled, or has been proven unfit. One stated that there may be instances where both parents do not agree, but the court should still be encouraged to consider each parent's request. A commenter also pointed to case law holding that a single parent's request can constitute good cause. According to this commenter, if a noncustodial parent may not invoke § 1912 to thwart an adoption, under *Adoptive Couple*, then a noncustodial parent has no right to be heard on placement preferences. A commenter stated that the ordinary meaning of § 1915(c) is that the preference of the parent—meaning one or both parents—be considered in applying or departing from the placement preferences, where appropriate.

Response: The final rule changes the requirement for both parents to make the request to "one or both parents," in recognition that in some situations, both parents may not be available to make the request. This is also consistent with the statutory mandate that, where appropriate, the preference of the Indian child or parent [(singular)] shall be considered. 25 U.S.C. 1915(c). If the parents both take positions on the placement, but those positions are different, the court should consider both parents' positions.

Comment: A few commenters suggested the court should also consider the preference of the child's guardian ad litem in making the placement.

Response: The rule does not add that a guardian ad litem's request should be considered as good cause because Congress expressly allowed for consideration of the preference of the Indian child or parent, and did not include the guardian ad litem. *See* 25 U.S.C. 1915(c).

Comment: A few commenters opposed the provision allowing consideration of the request of parents in determining good cause because, they stated, parents are often pressured to

accept placement and this provision encourages coercion. Another commenter stated that there is no rationale for acceding to a parental request for placement in the context of an involuntary removal of a child. Likewise, a few commenters stated that the parent's preference does not automatically show good cause to deviate and should only be a consideration. One commenter stated that parents who decided not to raise their child should not have unilateral authority to determine the child's placements and whether the child will have continued contact with relatives and the Tribe. One commenter supported including the parent's request as good cause, and asserted that a birthparent's preference should be considered unless otherwise proven not to be in the child's best interest.

Response: The statute explicitly provides that, where appropriate, preference of the parent must be considered. *See* 25 U.S.C. 1915(c). The regulation therefore provides that the request of the parent or parents should be a consideration in determining whether good cause exists. *See* FR § 23.132(c)(1). The request of the parent is not determinative, however. The final rule includes a provision requiring that the parent or parents attest that they have reviewed the placement options that comply with the order of preference are intended to help address concerns about coercion. *See* FR § 23.132(c)(1).

Comment: One commenter requested clarifying that the parent must attest that they have reviewed the actual families that meet the placement preferences, not just the categories. The commenter stated that if the parents still object after reviewing the preferences, the agency or court should first be required to explore other available preferred families before concluding there is good cause.

Response: The rule uses the term "placement options" to refer to the actual placements, rather than just the categories. *See* FR § 23.132(c)(1). A court or agency may consider in

determining whether good cause exists whether a diligent search was conducted for placements meeting the placement preferences.

Comment: One commenter stated that the non-Indian foster parent should not be considered the de facto parent for the purposes of this provision.

Response: The definition of "parent" does not include foster-care providers. *See* FR § 23.2.

c. Request of the Child as Good Cause

Comment: One commenter opposed allowing consideration of the request of the child in determining "good cause" at PR § 23.131(c)(2) because children can be groomed to request a certain placement and it is subjective when a child is able to understand the issue.

Response: The statute explicitly provides that, where appropriate, preference of the Indian child must be considered. *See* 25 U.S.C. 1915(c). The rule adds that the child must be of "sufficient age and capacity to understand the decision that is being made" but leaves to the fact-finder to make the determination as to age and capacity. *See* FR § 23.132(c)(2). The rule also leaves to the fact-finder any consideration of whether it appears the child was coached to express a certain preference.

Comment: One commenter agreed with not restricting this provision to children age 12 or older, but recommended language that the consent be completely voluntary and that there be a determination that the child can understand the decision being made, to protect against the child being pressured. Two other commenters stated that the rule should set a baseline age because otherwise there will be starkly different treatments of Indian children (e.g., reporting that South Carolina has found a 3-year-old competent to testify whereas in Oklahoma a 12-year old is presumed competent to state a preference).

Response: Each Indian child and their circumstances differ to a degree that it is not be appropriate to establish a threshold age for a child to express a preference. The rule leaves it to the fact finder to determine whether the child is of "sufficient age and capacity" to able to understand the decision that is being made.

Comment: Several commenters suggested that the rule should provide that Tribal approval of the non-preferred placement constitutes good cause because the rule should defer to a Tribe's determination that a non-preferred placement is in the child's best interests.

Response: The statute provides that the preference of the parent or child should be considered and allows the Tribe to express its preference by establishing a different order of preference by resolution. 25 U.S.C. 1915(c). In addition, the statute and the rule make clear that a foster home specified by the Indian child's Tribe is a preferred placement. FR § 23.131(b)(2).

d. Ordinary Bonding and Attachment

Comment: Many commented on ordinary bonding and attachment. A high-level summary of these comments is provided here. Many commenters strongly supported PR § 23.131(c)(3), stating that "ordinary bonding or attachment" does not qualify as the extraordinary physical or emotional needs that may be a basis for good cause to deviate from the placement preferences. Some who supported the provision cited agencies' deliberate failure to identify preferred placements as reasons for a child being initially placed with a non-preferred placement. Among the reasons cited for support of this provision were:

- Ordinary bonding is not relevant to good cause to deviate from placement preferences because ordinary bonding shows that the child is healthy and can bond again.
- The proposed provision is limited in that it still allows for consideration of extraordinary bonding as good cause.

- Many Western bonding and attachment theories are not as relevant to Indian children because they are based on non-indigenous beliefs and psychological theories about connection with one or two individual parents.
- Allowing normal emotional bonding to be considered good cause would negate ICWA's presumption that the statutory placement preferences are in the Indian child's best interest.
- The proposed provision is needed to address the tactic of placing Indian children in non-preferred placements, delaying notification to the child's Tribe and family, then arguing good cause to deviate from the placement preferences based on the child's bonding with the caregivers (in other words, the proposed provision is necessary to remove incentives to place children in non-preferred placement families and removes rewards for non-compliance).
- The proposed provision is necessary to encourage diligent searches to identify preferred placements.
- The proposed provision supports the intent of ICWA to return a child to biological family even where there is a psychological parenting relationship between the placement family and child, and that Congress arrived at this approach after debate and ample testimony, including significant testimony from mental health practitioners.
- The proposed provision recognizes that the long-term best interests protected by ICWA outweigh short-term impacts of breaking an ordinary bond.
- Comparing emotional ties between the foster family and child to those with a biological family undermines the objective of reunification and preservation of families.
- Opposing arguments are unfounded.

Some interpreted the rule as establishing that ordinary bonding or attachment resulting from a non-preferred placement must not be the "sole basis" for a court refusing to return a child to his or her family and supported this interpretation.

Many commenters strongly opposed PR § 23.131(c)(3)'s exclusion of "ordinary bonding or attachment" as a basis for good cause to deviate from the placement preferences. According to these commenters, the main reason for initial non-preferred placements is unavailability of homes meeting the placement preferences, and that despite the best efforts of caseworkers to find preferred placements, it becomes necessary to put Indian children in non-preferred placements. Other cited reasons were that preferred placements were too far away or the Tribe delays finding a preferred placement. Among the reasons stated for opposition to the provision were:

- Ordinary bonding is relevant to whether there is good cause to deviate from the placement preferences because breaking ordinary bonds harms the child.
- The importance of bonding to children's well-being has been established by documented research.
- Indian children do not bond differently from other children.
- The proposed provision limits court discretion.
- The proposed provision violates children's constitutional rights, giving them less protection than other children to a stable, permanent placement that allows the caretaker to make a full emotional commitment to the child.
- The proposed provision violates precedent of a majority of State courts that have held they may consider the Indian child's attachment to, or bond with, current caregivers and the amount of time the child has been with caregivers.
- The proposed provision will increase resistance to ICWA.

- The proposed provision encourages breaking of ordinary bonds.
- The proposed provision will not address historical trauma.
- The proposed provision places Tribal interests above the child's interests.

Some commenters neither fully supported nor fully opposed the provision prohibiting consideration of ordinary bonding as good cause. A few agreed that a prolonged placement arising out of a violation of ICWA should not constitute good cause, but expressed concern that the provision could preclude a court's consideration of the likelihood of severe emotional trauma to a child from a change in placement under any circumstance, placing an unnecessary constraint on State courts and disserving Indian children. One commenter stated that bonding should not be considered, whether ordinary or extraordinary. Some commenters suggested alternative approaches to the provision prohibiting consideration of ordinary bonding as good cause.

Response: The final rule provides that a court may not consider, as the sole basis for departing from the preferences, ordinary bonding or attachment that flows from time spent in a non-preferred placement that was made in violation of ICWA. In response to commenters' concerns, the final rule adjusts the proposed provision regarding "ordinary bonding" as not being within the scope of extraordinary physical, mental, or emotional needs. PR § 23.131(c)(3). The proposed provision may have inappropriately limited court discretion in certain circumstances. This is particularly the case, given the apparent ambiguity regarding the proposed provision's reference to "placement[s] that do[] not comply with ICWA." *Id.*

The Department recognizes that the concepts of bonding and attachment can have serious limitations in court determinations. *See e.g.*, Comments of Casey Family Programs, et al., at 6 n.9 (citing literature including David E. Arrendondo & Leonard P. Edwards, Attachment, Bonding, and Reciprocal Connectedness, 2 J. Ctr. for Fam. Child. & Cts. 109, 110-111 (2000)

(discussing the ways that bonding and attachment theory "may mislead courts")). The Department also recognizes that, as the Supreme Court has cautioned, courts should not "'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation,'" *Holyfield*, 490 U.S. at 54 (citation omitted), by treating relationships established by temporary, non-ICWA-compliant placements as good cause to depart from ICWA's mandates.

The final rule, therefore, adjusts the "ordinary bonding" provision, stating that ordinary bonding and attachment that flows from length of time in a non-preferred placement due to a violation of ICWA should not be the sole basis for departing from the placement preferences. This provision addresses concerns that parties may benefit from failing to identify that ICWA applies, conduct the required notifications, or identify preferred placements. While it can be difficult for children to shift from one custody arrangement to another, one way to limit any disruption is to mandate careful adherence to procedures that minimize errors in temporary or initial custodial placements. It can also be beneficial to facilitate connections between an Indian child and potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the agency or court should promote connections and bonding with extended family or other preferred placements who may live further away. In this way, the child has the opportunity to develop additional bonds with these preferred placements that will ease any transitions.

The comments reflected some confusion regarding what constitutes a "placement that does not comply with ICWA." For clarity, the final rule instead references a "violation" of ICWA to emphasize that there needs to be a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact

specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been clearly identified at the start of the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.

Comment: A few commenters stated that the rule eradicates courts' ability to find "good cause" to deviate from the placement preferences by requiring that only qualified expert witnesses can demonstrate good cause based on "extraordinary bonding."

Response: The final rule does not require testimony from a qualified expert witness to establish a good cause determination based on the extraordinary physical, mental, or emotional needs of the child. *See* FR § 23.132(c).

e. Unavailability of Placement as Good Cause

Comment: One commenter supported PR § 23.131(c)(4) except for the reference to "applicable agency" because the placement preferences apply even when no agency is involved.

Response: The final rule deletes reference to "applicable agency" in this section.

Comment: A few commenters suggested clarifying that a "diligent search" for a preferred placement must be conducted, rather than requiring "active efforts" because "active efforts" is a term of art with specific statutory application.

Response: The final rule clarifies that a diligent search must be conducted, rather than using the phrase "active efforts," because the statute uses the phrase "active efforts" in a different context. *See* FR § 23.132(c)(5).